

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
www.state.sd.us/atg

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

January 18, 2011

James B. Martin
Regional Administrator
U.S. Environmental Protection Agency
Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129

Re: *State of South Dakota's State Implementation Plan for Regional Haze
Legal Authority and Compliance with Procedural Requirements*

Dear Mr. Martin:

At the request of the State of South Dakota Department of Environment and Natural Resources ("DENR"), I have reviewed the relevant elements of the South Dakota Regional Haze State Implementation Plan prepared and submitted by DENR to the United States Environmental Protection Agency ("EPA"). This letter confirms that DENR has legal authority to carry out the State Implementation Plan for Regional Haze and adopt the administrative rules described in that Plan; confirms that DENR has complied with the procedural requirements applicable to the adoption of the administrative rules; and identifies and provides a copy of the sources of DENR's authority to implement and enforce applicable statutes and rules as required by 40 C.F.R. 51.230. This letter is provided for inclusion in the DENR's SIP submission concerning Regional Haze to EPA to satisfy the requirement of 42 U.S.C. 7410(a)(2)(E).

I. Legal Authority to Adopt.

DENR is an agency of the State of South Dakota, created by the South Dakota Legislature. SDCL 1-40-1. One of its functions is the development and implementation of the State's Air Pollution Control Program, established by the Legislature in SDCL ch. 34A-1. SDCL 1-40-24.

The Board of Minerals and Environment ("BME") is a board within DENR. SDCL 1-40-25 and -25.1. The Secretary of DENR is responsible for the administration of the provisions of SDCL

ch. 34A-1, except for quasi-judicial and quasi-legislative functions, which are the responsibility of the BME. SDCL 34A-1-5.

The Legislature established the State's Air Pollution Control Program. SDCL 34A-1-1 states:

It is hereby declared to be the public policy of the state to achieve and maintain reasonable levels of air quality which will protect human health and safety, prevent injury to plant and animal life and property, foster the comfort and convenience of its inhabitants, promote the economic and social development of the state and, to the greatest degree practicable, facilitate the enjoyment of the natural attractions of the state. It is also declared that local and regional air pollution control programs are to be supported to the extent practicable as essential instruments for the securing and maintenance of appropriate levels of air quality. *To these ends it is the purpose of this chapter to provide for a coordinated state-wide program of air pollution prevention, abatement and control*, for an appropriate distribution of responsibilities among the state and local units of government, and to facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within single jurisdictions, and to provide a framework within which all values may be balanced in the public interest.

SDCL 34A-1-1 (emphasis added.)

The BME is authorized by the Legislature to adopt administrative rules. SDCL 34A-1-5. (BME is to perform any quasi-legislative functions of SDCL ch. 34A-1; the adoption of administrative rules is a quasi-legislation function.) The Legislature has set out the specific areas regarding which administrative rules may be adopted. SDCL 34A-1-6 authorizes the Board to promulgate rules to, inter alia, establish ambient air standards, require records, installation of monitoring equipment, emission sampling methodology, procedures for attainment and maintenance of ambient air quality standards, and the monitoring of ambient air quality. SDCL 34A-1-11 authorizes the BME to "classify air contaminant sources according to levels and types of emissions and other characteristics which relate to air pollution" and establish reporting requirements for any such class or classes. SDCL 34A-1-15 requires the BME to promulgate rules establishing "ambient air quality standards for the state as a whole or for any part of the state."

In addition, SDCL 34A-1-21 provides specific authority for the BME to prohibit, by rule, "the installation, alteration, or use of any machine, equipment, device, or other article which it finds may cause or contribute to air pollution or is intended primarily to prevent or control the emission of air pollutants, unless a permit therefor has been obtained from the board or the secretary." The BME is also explicitly authorized to adopt rules setting forth application requirements, including the submission of plans, specifications, "and such other information as the board deems necessary." SDCL 34A-1-21.

These statutes provide legal authority to the BME to adopt the emissions standards and limitations and other measures set forth in the air quality rules (Administrative Rules of South Dakota ("ARSD") Article 74:36), including the Regional Haze Program rules in ARSD chapter 74:36:21.

II. Applicable Procedural Requirements.

The State's Administrative Procedures Act establishes the procedures that must be followed by an agency in adopting rules. SDCL 1-26-4 et seq. The BME followed these procedures in adopting ARSD Chapter 74:36:21, Regional Haze Program. These rules were adopted by the BME on September 15, 2010, and became effective on December 7, 2010.

III. Legal Authority to Enforce.

DENR has the authority to enforce the applicable laws, regulations, and air quality standards.

All of the statutory authorities for rule-making power set forth above contain provisions relating to enforcement. SDCL 34A-1-6 and -15 explicitly state that violation of the rules promulgated under those statutes is subject to SDCL 34A-1-39. This statute states as follows:

Any person subject to this section is liable for a civil penalty not to exceed ten thousand dollars per day of violation or for damages to the environment of the state, or both.

SDCL 34A-1-21 also contains this language. Additionally, it states:

A violation of a condition of a permit issued pursuant to this section is subject to § 34A-1-39. Any person who, without a permit, commits an action for which a permit is required is guilty of a Class 1 misdemeanor. Any violation of a permit condition is a Class 2 misdemeanor and is subject to § 34A-1-39.

SDCL 34A-1-22 gives the DENR specific authority to "enjoin the construction, modification, or operation of any stationary source of air pollution at any location where the emissions from such sources will prevent the attainment and maintenance of compliance with rules and regulations adopted by the board." The Secretary of DENR is also given authority in SDCL 34A-1-45 to issue emergency orders that are immediately effective:

Any other provisions of law to the contrary notwithstanding, if the secretary finds that any person is causing or contributing to air pollution and that such pollution creates an emergency by causing imminent danger to human health or safety and requires immediate action to protect human health or safety, the secretary shall order such person or persons to reduce or discontinue immediately the emission of air contaminants.

These remedies are not exclusive; an action for a civil penalty does not bar enforcement by injunction. SDCL 34A-1-52. Further, DENR is not required to exhaust its administrative remedies before bringing court action. SDCL 34A-10-16.

Thus, DENR can enforce applicable laws, regulations, and standards by civil penalty and/or injunctive action. DENR can also enforce the requirements to obtain a permit by criminal action. SDCL 34A-1-21.

DENR can abate pollutant emissions on an emergency basis to prevent substantial endangerment to health using the legal processes set forth in SDCL 34A-1-22 (civil injunctive suit, which includes preliminary injunctive remedies; see SDCL 21-8-1) and SDCL 34A-1-45 (administrative remedy). The administrative remedy authorizes issuance of an emergency order for immediate reduction or discontinuance of emissions, which is effective immediately upon service. A hearing process for emergency orders is established, and occurs *after* the effective date of the order. SDCL 34A-1-46.

DENR has authority to prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard. This authority appears at SDCL 34A-1-22.

DENR has authority to obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources. The authority to adopt rules regarding these requirements appears above. In addition, SDCL 34A-1-11 authorizes the BME to adopt rules that classify air contaminant sources "according to levels and types of emissions and other characteristics which relate to air pollution, and may require reporting for any such class or classes." SDCL 34A-1-12 authorizes the DENR or the BME to require the owner or operator of an air contaminant source to require, establish, and maintain records, and sample emissions in accordance with specified methods, locations, and procedures. SDCL 34A-1-40 authorizes the BME to investigate sources of air emissions; SDCL 34A-1-41 authorizes DENR to enter and inspect any property which is reasonably believed to be a source of air pollution.

The State's statutes and regulations also require owners or operators of stationary sources to install, maintain and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from stationary sources. SDCL 34A-1-12 (reporting); SDCL 34A-1-19 (installation, maintenance and use of emission monitoring devices); both discussed above. Reporting is required by state law to be made available to the public. SDCL 34A-1-14 states:

Any records, reports, or information obtained by the department or board from owners or operators of an air contaminant source or sources shall be available to the public, except that upon a showing satisfactory to the board by the owners or operators of an air contaminant source that the records, reports, or information

obtained by the department or board regarding processes or production technique are sufficiently unique to affect adversely the competitive position of the owner or operator by revealing trade secrets, the department and board shall consider the record, report, or information or particular portion thereof confidential in the administration of this chapter. . . . Notwithstanding the provisions of this section, all data relating to air pollution emissions as defined in § 34A-1-2, are public records, and subject to public disclosure as provided in § 1-40-31.

These statutes provide legal authority to adopt the Regional Haze rules in ARSD ch. 74:36:21, and meet the requirements of 40 C.F.R. 51.230. I have attached a copy of the referenced statutes and regulations hereto.

Very truly yours,



Roxanne Giedd
Deputy Attorney General
Chief, Civil Litigation Division
Attorney General's Office

RG/dh
Encs.

ARTICLE 74:36

AIR POLLUTION CONTROL PROGRAM

Chapter	
74:36:01	Definitions.
74:36:02	Ambient air quality.
74:36:03	Air quality episodes.
74:36:04	Operating permits for minor sources.
74:36:05	Operating permits for Part 70 sources.
74:36:06	Regulated air pollutant emissions.
74:36:07	New source performance standards.
74:36:08	National emission standards for hazardous air pollutants.
74:36:09	Prevention of significant deterioration.
74:36:10	New source review.
74:36:11	Performance testing.
74:36:12	Control of visible emissions.
74:36:13	Continuous emission monitoring systems.
74:36:14	Variances, Repealed.
74:36:15	Open burning, Transferred or Repealed.
74:36:16	Acid rain program.
74:36:17	Rapid City street sanding and deicing.
74:36:18	Regulations for state facilities in the Rapid City area.
74:36:19	Mercury budget trading program, Repealed.
74:36:20	Construction permits for new sources or modifications.
74:36:21	Regional haze program.

CHAPTER 74:36:21

REGIONAL HAZE PROGRAM

Section	
74:36:21:01	Applicability.
74:36:21:02	Definitions.
74:36:21:03	Existing stationary facility defined.
74:36:21:04	Visibility impact analysis.
74:36:21:05	BART determination.
74:36:21:06	BART determination for a BART-eligible coal-fired power plant.
74:36:21:07	Installation of controls based on visibility impact analysis or BART determination.
74:36:21:08	Operation and maintenance of controls.
74:36:21:09	Monitoring, recordkeeping, and reporting.
74:36:21:10	Permit to construct.
74:36:21:11	Permit required for BART determination.
74:36:21:12	Federal land manager notification and review.

74:36:21:01. Applicability. The provisions of this chapter apply to the owner or operator of a new major source, modification to a major source, and a BART-eligible source. The provisions of this chapter do not apply to a major source or major modification to an existing source applicable to chapters 74:36:09 and 74:36:10.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:02. Definitions. Unless otherwise specified, the terms used in this chapter mean:

(1) "Adverse impact on visibility," visibility impairment that interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the mandatory Class I federal area. Adverse impact on visibility shall be based on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency, and time of visibility impairment, and how these factors correlate with times of visitor use of a mandatory Class I federal area and the frequency and timing of natural conditions that reduce visibility;

(2) "BART," best available retrofit technology;

(3) "Best available retrofit technology" an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant that is emitted by an existing stationary facility. The emission limitation must be established, on a case-by-case basis, taking into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use or in existence at the source, the remaining useful life of the source, and the degree of improvement in visibility that may reasonable be anticipated to result from the use of such technology;

(4) "BART-eligible source," an existing stationary facility;

(5) "Coal-fired power plant," any person, corporation, limited liability company, association, company, partnership, political subdivision, municipality, rural electric cooperative, consumers power district, or any group or combination acting as a unit, owning or holding under lease, or otherwise real property used, or intended for use, for the conversion of coal into electric power;

(6) "Contribute to adverse impact on visibility," a change in visibility impairment in a mandatory Class I federal area of five-tenths deciviews or more, based on a 24-hour average, above the average natural visibility baseline. A source exceeds the threshold if the 98th percentile (eighth highest value) of the modeling results, based on one year of the three years of meteorological data modeled, equals or exceeds five-tenths deciviews;

(7) "Major source," as defined in § 74:36:01:08(2) and (3);

(8) "Mandatory Class I federal area," any area identified in 40 C.F.R. § 81, Subpart D (July 1, 2009); and

(9) "Visibility impairment," any human perceptible change in visibility such as light extinction, visual range, contrast, coloration, from that which would have existed under natural conditions.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:03. Existing stationary facility defined. An existing stationary facility is any of the following stationary sources of air pollutants, including any reconstructed source that was not in operation before August 7, 1962, and was in existence on August 7, 1977, and has the potential to emit 250 tons per year or more of any air pollutant. In determining potential to emit, fugitive emissions, to the extent quantifiable, must be counted for:

(1) Fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input;

(2) Coal cleaning plants (thermal dryers);

(3) Kraft pulp mills;

(4) Portland cement plants;

(5) Primary zinc smelters;

(6) Iron and steel mill plants;

(7) Primary aluminum ore reduction plants;

(8) Primary copper smelters;

(9) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(10) Hydrofluoric, sulfuric, and nitric acid plants;

(11) Petroleum refineries;

(12) Lime plants;

(13) Phosphate rock processing plants;

(14) Coke oven batteries;

(15) Sulfur recovery plants;

(16) Carbon black plants (furnace process);

(17) Primary lead smelters;

(18) Fuel conversion plants;

(19) Sintering plants;

(20) Secondary metal production facilities;

(21) Chemical process plants;

(22) Fossil-fuel boilers of more than 250 million British thermal units per hour heat input;

(23) Petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels;

(24) Taconite ore processing facilities;

(25) Glass fiber processing plants; and

(26) Charcoal production facilities.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:04. Visibility impact analysis. The owner or operator of a new major source or modification to a major source shall demonstrate to the department that the potential to emit from the new major source or modification to a major source will not contribute to adverse impact on

visibility in any mandatory Class I federal area. The demonstration shall be based on visibility models approved in 40 C.F.R. § 51, Subpart W (July 1, 2009).

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:05. BART determination. The owner or operator of a BART-eligible source that emits any air pollutant which may reasonably be anticipated to contribute to adverse impact on visibility in any mandatory Class I federal area shall submit a BART determination. The BART determination shall follow the procedures outlined in 40 C.F.R. § 51, Subpart Y (July 1, 2009) and must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source. In this analysis, the BART determination must take into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility that may reasonably be anticipated to result from the use of such technology. The BART determination shall be submitted within nine months after being notified by the department that the existing stationary source is reasonably anticipated to contribute to adverse impact on visibility in any mandatory Class I federal area.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:06. BART determination for a BART-eligible coal-fired power plant. The owner or operator of a BART-eligible coal-fired power plant may not cause or permit emissions of the following regulated air pollutant in excess of the following amounts:

(1) PM10 emissions in excess of 67.3 pounds per hour, which includes periods of startup and shutdown;

(2) PM10 emissions in excess of 0.012 pounds per million Btus, which includes periods of startup and shutdown;

(3) Sulfur dioxide emissions in excess of 505 pounds per hour, which includes periods of startup and shutdown;

(4) Sulfur dioxide emissions in excess of 0.09 pounds per million Btus, which does not include periods of startup and shutdown;

(5) Nitrogen oxide emissions in excess of 561 pounds per hour, which includes periods of startup and shutdown; and

(6) Nitrogen oxide emissions in excess of 0.10 pounds per million Btus, which does not include periods of startup and shutdown.

Compliance with the PM 10 emission limits shall be based on an annual stack performance test using the average of three 1-hour test runs. Compliance with the sulfur dioxide and nitrogen

oxide emission limits shall be based on using continuous emission monitoring systems and a 30-day rolling average.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:07. Installation of controls based on visibility impact analysis or BART determination. The owner or operator of a new major source, modification to a major source, or a BART-eligible source that emits any air pollutant which may reasonably be anticipated to contribute to adverse impact on visibility in any mandatory Class I federal area shall install, operate, and maintain the controls established in a visibility impact analysis or BART determination. The owner or operator of a new major source or modification to a major source must install and operate the controls established in a visibility impact analysis at initial startup. The owner or operator of a BART-eligible source required to install BART must install, operate, and demonstrate compliance with BART as expeditiously as practicable, but no later than five years from EPA's approval of the state implementation plan for regional haze.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:08. Operation and maintenance of controls. The owner or operator required to install and operate controls established in a visibility impact analysis or BART determination shall establish written procedures to ensure the control equipment is properly operated and maintained. The written procedures shall include, at a minimum, the following:

- (1) A maintenance schedule for each control device that is consistent with the manufacturer's instructions and recommendations for routine and long-term maintenance;
- (2) Procedures for the proper operation and maintenance of each control device; and
- (3) Parameters to be monitored to determine each control device is being operated properly.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:09. Monitoring, recordkeeping, and reporting. The owner or operator required to install and operate controls established in a visibility impact analysis or BART determination shall conduct periodic monitoring, recordkeeping, and reporting. All sulfur dioxide and nitrogen oxides emissions from the BART-eligible source shall be routed to the main stack of a BART-eligible source. Monitoring of sulfur dioxide and nitrogen oxide emissions from the main stack shall be conducted using a continuous emission monitoring system which complies with the continuous emission monitoring requirements in chapter 74:36:13. Monitoring requirements for other air pollutants from a BART-eligible source or from a major source or modification of a major source shall be in accordance with § 74:36:05:16.01(9). Recordkeeping and reporting shall comply with the requirements in § 74:36:05:16.01(9).

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:10. Permit to construct. The owner or operator subject to this chapter may be issued a permit to construct in accordance with chapter 74:36:20 if the department determines that the new major source or modification to a major source does not contribute to adverse impact on visibility at a mandatory Class I federal area.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:11. Permit required for BART determination. The owner or operator of a BART-eligible source shall submit an application in accordance with chapter 74:36:20 to include the controls, emission limits, monitoring, recordkeeping, and reporting requirements identified in the BART determination and approved by the department.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

74:36:21:12. Federal land manager notification and review. The department shall provide written notice to the federal land manager of a BART determination or any permit application for a new major source or modification to a major source if the emissions from which may contribute to adverse impact on visibility at a mandatory Class I federal area, except for an application submitted in accordance with chapter 74:36:09 or 74:36:10. A notification of a BART determination shall include a copy of the BART determination and must be submitted within 30 days of receipt of a complete BART determination. The department shall consider an analysis performed by the federal land manager submitted within 60 days of the federal land manager being notified of a BART determination or by the end of the public participation process, whichever is later. A permit application for a new major source or modification to a major source shall include a copy of the permit application and visibility impact analysis. The department shall consider an analysis performed by the federal land manager submitted within 30 days of the federal land manager being notified of a visibility impact analysis or by the end of the public participation process, whichever is later. The department shall follow the procedures outlined in chapter 74:36:09 or 74:36:10 for an application submitted in accordance with chapter 74:36:09 or 74:36:10.

Source: 37 SDR 111, effective December 7, 2010.

General Authority: SDCL 34A-1-6.

Law Implemented: SDCL 34A-1-6.

DEPARTMENT OF NATURAL RESOURCES.

§ 1-40-2

Section

- 1-40-30. Establishment of the environment and natural resources fee fund—Source of fund—Administration—Expenditures—Unexpended funds.
- 1-40-31. Full public disclosure of nonconfidential public records—Reproduction—Fee—Waiver—Response time to written requests—Denial of disclosure—Appeals—Promulgation of rules—Attorney's fees and costs for denial of access to hazardous waste public records.
- 1-40-32. Transfer of funds to environment and natural resources fee fund from water and environment fund.
- 1-40-33. Voluntary environmental audits—Assumption against civil or criminal penalties.
- 1-40-34. Application of environmental audit provisions—Discovery of violations.
- 1-40-35. Environmental audit subject to discovery—Summary of disclosed violation.
- 1-40-36. Use of environmental audit as defense.
- 1-40-37. Removal of regulated entity from environmental audit provisions.
- 1-40-38. Promulgation of rules governing inspection of certain concentrated animal feeding operations.

Commission Note

SL 1991, ch 17, § 17 (Executive Order 91-4), renamed the "Department of Water and Natural Resources" as the "Department of Environment and Natural Resources." The code commission has implemented this change in this chapter.

Administrative Code References

Environment and natural resources department, concentrated animal feeding operations, inspections, see S.D. Admin. R. 74:57:01.

United States Code Annotated

Hazardous substances, see 15 U.S.C.A. § 1261 et seq.

1-40-1. Department renamed

The former Department of Natural Resource Development, also formerly known as the Department of Water and Natural Resources, is hereby continued as the Department of Environment and Natural Resources.

Source: SL 1973, ch 2, § 114; SL 1979, ch 354, § 18; SL 1991, ch 17 (Ex. Ord. 91-4), § 17.

Cross References

Changes in department organization by secretary, see § 1-32-4.

Library References

States 6-45.

Westlaw Key Number Search: 360k45.

C.J.S. States §§ 79, 82, 136.

1-40-2. Secretary as head of department

The head of the Department of Environment and Natural Resources is the secretary of environment and natural resources.

Source: SL 1973, ch 2, § 115; SL 1991, ch 17 (Ex. Ord. 91-4), § 17.

DEPARTMENT OF NATURAL RESOURCES.

§ 1-40-25
Note 1

1-40-24. Performance of functions of Department of Health, secretary of health, and director of Division of Environmental Health relating to air quality and solid waste, radiation monitoring and mineral exploration, and control of hazardous materials and wastes—Transfer of personnel and budget of Division of Environmental Health

The functions of the Department of Health, the secretary of health, and the director of the Division of Environmental Health pursuant to chapters 34A-1 and 34A-6, their functions relating to radiation monitoring and control for mineral exploration, mining, milling, and processing pursuant to chapter 34-21, and their functions dealing with the generation, transportation, treatment, storage, and disposal of hazardous materials and wastes are transferred to the department and secretary of environment and natural resources. The personnel and budget of the Division of Environmental Health are transferred to the Department of Environment and Natural Resources.

Source: SL 1981, ch 374, § 25; SL 1991, ch 17 (Ex. Ord. 91-4), § 17.

1-40-25. Board of Minerals and Environment—Composition—Appointment and terms of members

The Board of Minerals and Environment shall consist of nine members appointed by the Governor, not all of whom shall be from the same political party. The terms of the members of the board shall be for four years. Each present member of the former Board of Environmental Protection, however, shall continue his existing term on the board without this order affecting the length or conditions of the present term. Appointments to fill vacancies created by the expiration of the terms of present members of the former Board of Environmental Protection shall be for four years. The terms of members of the board first appointed after July 1, 1981, shall be such that no more than three and no less than two members of the board, including those members continuing from the former Board of Environmental Protection, shall have terms expiring in any one calendar year. The length of such initial terms shall be designated by the Governor. Any member appointed to fill a vacancy arising from other than the natural expiration of a term shall serve for only the unexpired portion of the term.

Source: SL 1981, ch 374, §§ 19 to 22; SDCL Supp, § 1-43-7.1.

Library References

States §§ 45 to 48, 51. C.J.S. States §§ 61, 79 to 80, 82 to 84, 87, 91 to 92, 102, 136.
Westlaw Key Number Searches: 360k45 to 360k48; 360k51.

Notes of Decisions

In general 1

1. In general

Lack of proper notice to tract owners who contested application for unitization of portion of oil field did not deprive Board of Minerals

and Environment of subject matter jurisdiction, particularly where contesting tract owners made general appearance at all proceedings before Board, not once objecting to lack of personal jurisdiction, and participated fully in presentation of their own testimony, as well as cross-

§ 1-40-25

Note 1

examining witnesses for applicant. SDCL 1-32-2, 1-40-25, 45-9-54, 45-9-57. Application of Koch Exploration Co., 1986, 387 N.W.2d 530. Administrative Law And Procedure ☞ 454; Mines And Minerals ☞ 92.79

Unitization order issued by Board of Minerals and Environment after defective notice was void only as to those persons over whom Board failed to obtain personal jurisdiction and, thus, was valid as to tract owners who made general appearance in proceedings before Board. SDCL 1-32-2, 1-40-25, 45-9-54, 45-9-57. Application of Koch Exploration Co., 1986, 387 N.W.2d 530. Administrative Law And Procedure ☞ 455; Mines And Minerals ☞ 92.79

Administrative rule that application for order for unit operation be submitted to Board of Minerals and Environment at least 60 days before date requested for hearing was advisory only, and thus, Board's failure to wait 60 days

1-40-25.1. Board of Minerals and Environment composed in conformance with Clean Air Act

In addition to the provisions of § 1-40-25, the Board of Minerals and Environment shall be composed in conformance with the requirement of the Clean Air Act § 128 (42 USC § 7428) as amended to January 1, 1995, for all permits and enforcement orders initiated under chapter 34A-1.

Source: SL 1995, ch 318 (Ex. Ord. 95-2), § 15.

1-40-26. Officers of Board of Minerals and Environment—Quorum—Meetings

The Board of Minerals and Environment shall annually elect from its members such officers as it deems advisable. A majority of the board members shall be required to constitute a quorum. The board shall hold meetings at the call of the chairman or a majority of the members, but there shall be held at least one meeting every three months.

Source: SL 1973, ch 2, § 100; SL 1974, ch 3, § 37; SDCL Supp, §§ 1-38-5, 1-43-8.

Cross References

Meetings of public agencies, see § 1-25-1 et seq.

Library References

States ☞ 67.
Westlaw Key Number Search: 360k67.
C.J.S. States §§ 121, 136 to 138, 140.

1-40-27. Rejection of applications for certain environmental protection mining, oil, and gas permits

The secretary may reject an application for any permit filed pursuant to Title 34A or 45, including any application by any concentrated swine feeding operation for authorization to operate under a general permit, upon making a specific finding that:

STATE AFFAIRS AND GOVERNMENT DEPARTMENT

from time of filing to hold hearing on application for unitization did not deprive Board of subject matter jurisdiction. SDCL 1-32-2, 1-40-25, 45-9-54, 45-9-57. Application of Koch Exploration Co., 1986, 387 N.W.2d 530. Administrative Law And Procedure ☞ 468; Mines And Minerals ☞ 92.79

Board of Minerals and Environment had subject matter jurisdiction over tract owners challenging application for unitization of portion of oil field, pursuant to statute providing that Board had jurisdiction and authority over all persons and property necessary to effectively enforce provisions of chapter regulating oil and gas conservation and statute authorizing Board to hold hearing on filing of petition concerning any matter within Board's jurisdiction. SDCL 1-32-2, 1-40-25, 45-9-54, 45-9-57. Application of Koch Exploration Co., 1986, 387 N.W.2d 530. Mines And Minerals ☞ 92.79

- (1) The applicant permit director application
 - (a) Has per
 - (b) Has tur
 - (c) Has stat mal
 - (d) Has stat
 - (e) Has deno gooc gatic
- (2) The applicant reversed sion may applicatio represent cies that
 - All applications on, sworn to un
 - ed by reason of
 - vidence to the
 - llowing of the su
 - e application rev
 - e applicant has
 - gard to this cert
 - nd the applicati
 - Applications reje
 - on that applicat
 - nder chapter 1-26
 - ource: SL 1991, ch
 - Environmental Law ☞
 - Westlaw Key Number
 - 1-40-28. Registr
 - general permits
 - General permits i
 - ter public notice :

34A-1-1. Policy of state—Purpose of chapter

It is hereby declared to be the public policy of the state to achieve and maintain reasonable levels of air quality which will protect human health and safety, prevent injury to plant and animal life and property, foster the comfort and convenience of its inhabitants, promote the economic and social development of the state and, to the greatest degree practicable, facilitate the enjoyment of the natural attractions of the state. It is also declared that local and regional air pollution control programs are to be supported to the extent practicable as essential instruments for the securing and maintenance of appropriate levels of air quality. To these ends it is the purpose of this chapter to provide for a coordinated state-wide program of air pollution prevention, abatement and control, for an appropriate distribution of responsibilities among the state and local units of government, and to facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within single jurisdictions, and to provide a framework within which all values may be balanced in the public interest.

Source: SL 1970, ch 203, § 1; SDCL Supp, § 34-16A-1.

Library References

Environmental Law ¶241, 245.
Westlaw Key Number Searches: 149Ek241;
149Ek245.

Research References**ALR Library**

Injunction, right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.
Knowledge, scienter, or intent, necessity of showing, in prosecution for violation of air pollution or smoke control statute or ordinance, 46 A.L.R.3d 758.
Ringlemann smoke chart, evidence as to Ringlemann Chart observations, 51 A.L.R.3d 1026.
Smoke and other air pollution, validity of regulation of, 78 A.L.R.2d 1305.
Sufficiency of evidence of violation in administrative proceeding terminating in abatement order, 48 A.L.R.3d 795.

Validity of legislation permitting administrative agency to fix permissible standards of pollutant emission, 48 A.L.R.3d 326.
When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 A.L.R.4th 456.

Encyclopedias

61 Am. Jur.2d, Pollution Control, §§ 1-10, 19-52, 115 et seq.

Treatises and Practice Aids

State Environmental Law § 5:2.

United States Supreme Court**Environmental protection,***In general,*

Environmental law, forest management, land and resource management plans, pre-implementation judicial review, ripeness for adjudication, see *Ohio Forestry Ass'n Inc. v. Sierra Club*, U.S. Ohio.1998, 118 S.Ct. 1665, 523 U.S. 726.
Environmental protection, NPDES permits, interstate waters, water quality

standards of affected states, see *Arkansas v. Oklahoma*, U.S.1992, 112 S.Ct. 1046, 503 U.S. 91, 117 L.Ed.2d 239, on remand 962 F.2d 996.

Jurisdiction,

Indian reservations, Dawes Act, state or federal jurisdiction over unallotted lands, environmental regulations, landfill site, see *South Dakota v. Yankton Sioux Tribe*, U.S.S.D.1998, 118 S.Ct. 789, 522 U.S. 329.

Notes of Decisions

In general 1

1. In general

Const., Art. VIII, § 3 does not mandate that civil penalties collected pursuant to Titles 34A

and 45 be paid to the benefit of the public schools; those civil penalties which are not criminal sanctions can be paid into a newly created cleanup fund. Op. Atty. Gen. Opinion No. 88-04, 1988 WL 483251.

34A-1-2. Definition of terms

Terms used in this chapter mean:

- (1) "Air contaminant," dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substances, radioactive materials as defined in chapter 34-21, or any combination thereof;
- (2) "Air pollution," the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or tend to be injurious to human health or welfare, animals or plant life, or property, or would interfere with the enjoyment of life or property;
- (3) "Board," the Board of Minerals and Environment;
- (4) "Department," the Department of Environment and Natural Resources;
- (5) "Emission," a release into the outdoor atmosphere of air contaminants;
- (6) "Person," any individual, partnership, limited liability company, firm, association, municipality, public or private corporation, subdivision or agency of the state, trust, estate, or any other legal entity;
- (7) "Secretary," the secretary of environment and natural resources.

Source: SL 1970, ch 203, § 2; SDCL Supp, § 34-16A-2; SL 1973, ch 222, § 1; SL 1978, ch 250, § 6; SL 1994, ch 351, § 66.

Commission Note

SL 1991, ch 17, § 17 (Executive Reorganization Order 91-4), renamed the "Department of Water and Natural Resources" as the "Department of Environment and Natural Resources." The Code Commission has implemented this change in this section.

34A-1-3. Repealed by SL 1993, ch 256, § 1**Historical and Statutory Notes**

The repealed section related to acceptance and administration of grants and donations, deposit in treasury.

34A-1-4. Technical and operational services secured by secretary

The secretary shall have power to secure necessary scientific, technical, administrative, and operational services, including laboratory facilities by contract or otherwise.

Source: SL 1970, ch 203, § 5 (5); SDCL Supp, § 34-16A-8; SL 1977, ch 280, § 2.

Cross References

Office of laboratory services, see § 1-49-1 et seq.

Library References

Environmental Law ⇌242.
Westlaw Key Number Search: 149Ek242.

34A-1-5. Administration of chapter—Board functions—Enforcement as to radioactive substances

The administration of this chapter shall be the responsibility of the secretary of water and natural resources except that the Board of Minerals and Environment shall perform any quasi-judicial, quasi-legislative, advisory, and special budgetary functions set out in this chapter. The board, with the concurrence of the secretary of water and natural resources may enforce those regulations promulgated pursuant to chapter 34-21 which pertain to the release of radioactive substances into the atmosphere.

Source: SL 1970, ch 203, § 3; SDCL Supp, § 34-16A-11; SL 1971, ch 204, § 1; SL 1977, ch 280, § 3; SL 1978, ch 250, § 7.

Library References

Environmental Law ⇌242, 256, 472.
Westlaw Key Number Searches: 149Ek242;
149Ek256; 149Ek472.

34A-1-6. Promulgation of rules—Purpose—Violation

The Board of Minerals and Environment may promulgate rules pursuant to chapter 1-26:

- (1) To establish ambient air quality standards;
- (2) To specify kind and composition of fuel sold, stored, or used;
- (3) To establish requirements for open burning;
- (4) To require records and maintenance of records, reports, install, use, and maintain monitoring equipment;
- (5) To establish methods including sampling of emissions for air pollution sources;
- (6) To establish requirements for methods and installation of machines or devices to prevent or significantly reduce air emissions;
- (7) To establish procedures for attainment and maintenance of ambient air quality standards;
- (8) To monitor ambient air quality;
- (9) To establish procedures for variances and renewal of variances; and
- (10) To establish air quality standards, requirements and procedures related to incinerators for municipal solid waste.

A violation of the rules promulgated pursuant to this section is subject to § 34A-1-39.

Source: SL 1970, ch 203, § 5 (1); SDCL Supp, § 34-16A-12; SL 1977, ch 280, § 4; SL 1980, ch 238, § 10; SL 1990, ch 283, § 1; SL 1992, ch 158, § 6A.

Cross References

Agency rulemaking procedure, see § 1-26-4 et seq.
 Limitation on stringency of state rules, see § 1-40-4.1.

Research References**Treatises and Practice Aids**

State Environmental Law § 8:5.

United States Supreme Court**Air quality standards,**

Approval of state plans for achieving federal ambient air quality standards, see *Train v. Natural Resources Defense Council, Inc.*, U.S.Ga.1975, 95 S.Ct. 1470, 421 U.S. 60, 43 L.Ed.2d 731.

Revisions to national ambient air quality standards, delegation of legislative power, final agency action, see *Whitman v. American Trucking Associations, Inc.*, U.S.Dist.Col.2001, 121 S.Ct. 903.

Notes of Decisions**In general** 1

state owned agencies. Op.Atty.Gen. Opinion No. 78-57, 1978 WL 33926.

1. In general

Rules promulgated by board pursuant to this section and § 34A-1-18 are enforceable against

34A-1-6.1. Rules relating to incinerators for municipal solid waste—Requirements—Inapplicable as to medical waste incineration—Violation

The Board of Minerals and Environment shall promulgate rules governed by subdivision § 34A-1-6(10) by October 1, 1990. No new permit related to incinerators for municipal solid waste may be issued under this chapter until the rules required in this section are in effect. The rules required in this section need not address medical waste incineration, and the prohibition of permitting provided in this section does not apply to medical waste incineration. A violation of the rules promulgated pursuant to this section is subject to § 34A-1-39.

Source: SL 1990, ch 283, § 1A; SL 1992, ch 158, § 6B.

Cross References

Limitation on stringency of state rules, see § 1-40-4.1.

Library References

Environmental Law ¶272.
 Westlaw Key Number Search: 149Ek272.

34A-1-7. Employment of personnel by department

In accordance with chapter 3-6A, the department may employ, compensate, and prescribe the powers and duties of such persons as may be necessary to carry out the provisions of this chapter.

Source: SL 1970, ch 203, § 3; SDCL Supp, § 34-16A-14; revised pursuant to SL 1967, ch 265.

34A-1-8. Delegation of functions by secretary

The secretary may delegate to officers and employees of the department such functions, duties, and authority as are vested in the department by this chapter.

Source: SL 1970, ch 203, § 3; SDCL Supp, § 34-16A-15.

Library References

Environmental Law ☞242, 256, 289.
Westlaw Key Number Searches: 149Ek242;
149Ek256; 149Ek289.

34A-1-9. Studies, investigations and educational activities of department

The department shall have power to:

- (1) Encourage and conduct studies, investigations and research relating to air pollution and its causes, effects, prevention, abatement, and control.
- (2) Determine by means of field studies and sampling the degree of air pollution in the state and the several parts thereof.
- (3) Make a continuing study of the effects of the emission of air contaminants from motor vehicles on the quality of the outdoor atmosphere of this state and the several parts thereof, and make recommendations to appropriate public and private bodies with respect thereto.
- (4) Collect and disseminate information and conduct educational and training programs relating to air pollution.

Source: SL 1970, ch 203, § 5 (9) to (11), (13); SDCL Supp, § 34-16A-16; SL 1977, ch 280, § 5.

Library References

Environmental Law ☞242, 256, 289.
Westlaw Key Number Searches: 149Ek242;
149Ek256; 149Ek289.

34A-1-10. Cooperation by department with other agencies

The department may:

- (1) Advise, consult, and cooperate with agencies of the state, local governments, industries, other states, interstate or interlocal agencies, and the federal government, and with interested persons or groups.
- (2) Encourage local units of government to handle air pollution problems within their respective jurisdictions and on a cooperative basis, and to provide technical and consultative assistance therefor.
- (3) Encourage voluntary cooperation by persons, or affected groups to achieve the purposes of this chapter.
- (4) Consult, upon request, with any person proposing to construct, install, or otherwise acquire an air contaminant source or device or system for the control thereof, concerning the efficacy of such device or system, or the air pollution problem that may be related to the source, device or system. Nothing in any such consultation may be construed to relieve

any person from compliance with this chapter, rules and regulations in force pursuant thereto, or any other provisions of law.

Source: SL 1970, ch 203, § 5(6) to (8), (14), (15); SDCL Supp, § 34-16A-17; SL 1977, ch 280, § 6; SL 1986, ch 295, § 6.

Library References

Environmental Law ☞242, 256, 289.
Westlaw Key Number Searches: 149Ek242;
149Ek256; 149Ek289.

34A-1-11. Classification of air contaminant sources—Reporting requirements

The Board of Minerals and Environment, by rules promulgated pursuant to chapter 1-26, may classify air contaminant sources according to levels and types of emissions and other characteristics which relate to air pollution, and may require reporting for any such class or classes. Classifications made pursuant to this section may be for application to the state as a whole or to any designated area of the state, and shall be made with special reference to effects on health, economic and social factors, and physical effects on property.

Source: SL 1970, ch 203, § 6; SDCL Supp, § 34-16A-18; SL 1977, ch. 280, § 7; SL 1980, ch 238, § 11; SL 1993, ch 256, § 2.

Cross References

Agency rulemaking procedure, see § 1-26-4 et seq.

Library References

Environmental Law ☞266.
Westlaw Key Number Search: 149Ek266.

34A-1-12. Records and reports required on air contaminant sources—Monitoring and sampling methods—Other information—Violation

The department or board may require the owner or operator of any air contaminant source to establish and maintain such records; make such reports; install, use, and maintain such monitoring equipment or methods; sample such emissions in accordance with such methods, at such locations, intervals, and procedures as the department or board shall prescribe; and provide such other information relative to compliance with this chapter and rules and regulations in force pursuant thereto as the department or board may require, including the location, size of and height of contaminant outlets, processes employed, fuels used and the nature and time periods or duration of emissions. Any violator of this section is subject to § 34A-1-39.

Source: SL 1970, ch 203, § 6; SDCL Supp, § 34-16A-19; SL 1973, ch 222, § 4; SL 1992, ch 158, § 7.

Library References

Environmental Law ☞266, 275.
Westlaw Key Number Searches: 149Ek266;
149Ek275.

34A-1-13. Access to records relating to air pollution emissions

The board shall have power to require access to records relating to emissions which cause or contribute to air pollution.

Source: SL 1970, ch 203, § 5 (4); SDCL Supp, § 34-16A-20; SL 1977, ch 280, § 8.

34A-1-14. Records and information available to public—Exception to protect trade secrets—Authorized use—Violation as misdemeanor

Any records, reports, or information obtained by the department or board from owners or operators of an air contaminant source or sources shall be available to the public, except that upon a showing satisfactory to the board by the owners or operators of an air contaminant source that the records, reports, or information obtained by the department or board regarding processes or production technique are sufficiently unique to affect adversely the competitive position of the owner or operator by revealing trade secrets, the department and board shall consider the record, report, or information or particular portion thereof confidential in the administration of this chapter. Nothing in this section prevents the disclosure of otherwise confidential records or information by the department or board, or any department, agency, or officer of state government if necessary for the prosecution of violations of the chapter or rules promulgated pursuant to this chapter. Nothing in this section prevents the use of such records or information by the department, or any department, agency, or officer of the state government in compiling or publishing analyses or summaries relating to the general condition of the outdoor atmosphere if the analyses or summaries do not identify, directly or indirectly, any owner or operator or reveal any information otherwise confidential under this section. Notwithstanding the provisions of this section, all data relating to air pollution emissions as defined in § 34A-1-2, are public records, and subject to public disclosure as provided in § 1-40-31.

A violation of this section is a Class 2 misdemeanor.

Source: SL 1970, ch 203, §§ 13, 15; SDCL Supp, § 34-16A-21; SL 1973, ch 222, § 5; SL 1977, ch 190, § 30; SL 1995, ch 203, § 1.

Cross References

Crimes, penalties for classified misdemeanors, see § 22-6-2.

34A-1-15. Establishment of ambient air quality standards—Violation

The Board of Minerals and Environment shall promulgate rules pursuant to chapter 1-26 to establish ambient air quality standards for the state as a whole or for any part of the state. Any person who violates these standards is subject to § 34A-1-39.

Source: SL 1970, ch 203, § 5 (12); SDCL Supp, § 34-16A-22; SL 1977, ch 280, § 9; SL 1980, ch 238, § 12; SL 1992, ch 158, § 8; SL 1993, ch 256, § 3.

Library References

Environmental Law ⇐256.

Westlaw Key Number Search: 149Ek256.

Research References

Treatises and Practice Aids

Surface Mining And Reclamation Operations Under A Federal Program For The State Of South Dakota, 47 Federal Register 34760.

United States Supreme Court

Air quality standards,

Approval of state plans for achieving federal ambient air quality standards, see *Train v. Natural Resources Defense Council, Inc.*, U.S.Ga.1975, 95 S.Ct. 1470, 421 U.S. 60, 43 L.Ed.2d 731.

Revisions to national ambient air quality standards, delegation of legislative power, final agency action, see *Whitman v. American Trucking Associations, Inc.*, U.S. Dist. Col. 2001, 121 S.Ct. 903.

34A-1-16. Specification of fuels permitted in state—Violation

The Board of Minerals and Environment may promulgate rules pursuant to chapter 1-26 that specify the kind or composition of fuels permitted to be sold, stored or used within the state if it is deemed by the board to be necessary for the achievement of ambient air quality standards. Any person who violates these rules is subject to § 34A-1-39.

Source: SDCL, § 34-16A-16 as added by SL 1973, ch 222, § 2; SDCL Supp, § 34-16A-22.1; SL 1980, ch 238, § 13; SL 1992, ch 158, § 9; SL 1993, ch 256, § 4.

Library References

Environmental Law ¶266, 275.
Westlaw Key Number Searches: 149Ek266;
149Ek275.

34A-1-17. Contamination within plant excluded from jurisdiction

Nothing in this chapter shall be construed to grant to the department or board any jurisdiction or authority with respect to air contamination existing solely within commercial and industrial plants, works, or shops.

Source: SL 1970, ch 203, § 17; SDCL Supp, § 34-16A-23.

Library References

Environmental Law ¶285.
Westlaw Key Number Search: 149Ek285.

34A-1-18. Emission control and open burning requirements—Local control—Nonconformance as violation

The Board of Minerals and Environment, for the purpose of controlling pollution, shall by rules promulgated pursuant to chapter 1-26 establish emission control requirements and reasonable requirements for open burning. The requirements may vary from area to area, as may be appropriate to facilitate accomplishment of the purposes of this chapter, and in order to take necessary or desirable account of varying local conditions. Any general prohibition against all open burning shall be determined by each municipality or by each county for areas outside the boundaries of the municipalities. The board may

not adopt any rule generally prohibiting all open burning, but any board rule regulating open burning shall be only as is necessary to address a specific problem. Any person who allows an emission which does not conform to a requirement in force pursuant to this section is subject to § 34A-1-39.

Source: SL 1970, ch 203, § 9; SDCL Supp, § 34-16A-24; SL 1977, ch 280, § 10; SL 1977, ch 281, § 1; SL 1980, ch 238, § 14; SL 1992, ch 158, § 10; SL 1993, ch 256, § 5.

Cross References

Agency rulemaking procedure, see § 1-26-4 et seq.
Limitation on stringency of state rules, see § 1-40-4.1.

Library References

Environmental Law ⇐272.
Westlaw Key Number Search: 149Ek272.

Notes of Decisions

In general 1

state owned agencies. Op.Atty.Gen. Opinion No. 78-57, 1978 WL 33926.

1. In general

Rules promulgated by board pursuant to this section and § 34A-1-6 are enforceable against

34A-1-19. Emission control methods and devices required—Permission to use alternative methods—Violation

Whenever the board finds that there are methods, machines, devices, or construction features which are reasonably feasible that will prevent or significantly reduce the emission of air resulting in pollution and that the public interest will be served thereby, it may require the use of such methods and the installation of such features, machines, or devices; provided, however, that the owner or operator of an air contaminant source may use any methods, construction features, machines, or devices which are as effective as those required by the board. The owner or operator of an air contaminant source may apply to the board for permission to use alternative methods, construction features, machines, or devices upon a showing by the owner or operator that the alternative methods, construction features, machines, or devices are as effective as those required by the board. Any person who violates this section is subject to § 34A-1-39.

Source: SL 1970, ch 203, § 7; SDCL Supp, § 34-16A-26; SL 1973, ch 222, § 6; SL 1992, ch 158, § 11.

Library References

Environmental Law ⇐266, 275, 295.
Westlaw Key Number Searches: 149Ek266;
149Ek275; 149Ek295.

34A-1-20. Maintenance of motor vehicle emission control devices—Violation

The Board of Minerals and Environment may promulgate rules pursuant to chapter 1-26 to control emissions from motor vehicles by the proper maintenance

nance of all emission control equipment with which the vehicle was equipped at the time of original purchase. Any violation of these rules is subject to § 34A-1-39.

Source: SL 1973, ch 222, § 3; SDCL Supp, § 34-16A-26.1; SL 1980, ch 238, § 15; SL 1992, ch 158, § 12; SL 1993, ch 256, § 6.

Library References

Environmental Law ¶273.

Westlaw Key Number Search: 149Ek273.

34A-1-21. Permits required for air pollutant equipment and control devices—Applications—Rules—Recommendations by secretary—Hearings—Violation—Actions taken without a permit or in violation of permit conditions as misdemeanors

The board may prohibit, by rules promulgated pursuant to chapter 1-26, the installation, alteration, or use of any machine, equipment, device, or other article which it finds may cause or contribute to air pollution or is intended primarily to prevent or control the emission of air pollutants, unless a permit therefor has been obtained from the board or the secretary. Any person in violation of these rules is subject to § 34A-1-39.

The board may require that applications for such permits shall be accompanied by plans, specifications, and such other information as the board deems necessary.

The board, by rules promulgated pursuant to chapter 1-26, shall provide for the issuance, suspension, revocation, and renewal of any permits which it may reasonably require pursuant to this section. Procedures shall provide for a recommendation on such a permit matter by the secretary with an opportunity for a contested case hearing by the board on its own motion or upon protest by the applicant or an adversely affected person. If the recommendation of the secretary is not contested, that recommendation shall become a final determination on the application. If an uncontested recommendation is for approval or conditional approval of the application, the permit shall be issued by the secretary consistent with his recommendation.

A violation of a condition of a permit issued pursuant to this section is subject to § 34A-1-39.

Any person who, without a permit, commits an action for which a permit is required is guilty of a Class 1 misdemeanor. Any violation of a permit condition is a Class 2 misdemeanor and is subject to § 34A-1-39.

Source: SL 1970, ch 203, § 7; SDCL Supp, § 34-16A-27; SL 1977, ch 280, § 11; SL 1980, ch 238, § 16; SL 1991, ch 288, § 5; SL 1992, ch 158, § 13; SL 1992, ch 254, § 94.

Cross References

Contested cases, see § 1-26-16 et seq.

Crimes, penalties for classified misdemeanors, see § 22-6-2.

Deposition of witnesses, see § 1-26-19.2.

§ 34A-1-21

ENVIRONMENTAL PROTECTION

Limitation on stringency of state rules, see § 1-40-4.1.
Reports required following the issuance of uncontested permits, see § 1-40-29.
Rules, procedure for adoption, see §§ 1-26-4 to 1-26-14.
Subpoena and administration of oaths to witnesses, see § 1-26-19.1.

Library References

Environmental Law ☞265.
Westlaw Key Number Search: 149Ek265.

Research References

Treatises and Practice Aids

Surface Mining And Reclamation Operations
Under A Federal Program For The State Of
South Dakota, 47 Federal Register 34760.

34A-1-22. Prevention of stationary pollution sources not in compliance

The department may enjoin the construction, modification, or operation of any stationary source of air pollution at any location where the emissions from such sources will prevent the attainment and maintenance of compliance with rules and regulations adopted by the board.

Source: SDCL, § 34-16A-16 as added by SL 1973, ch 222, § 2; SDCL Supp, § 34-16A-27.1; SL 1992, ch 158, § 14.

Cross References

Limitation on stringency of state rules, see § 1-40-4.1.

Library References

Environmental Law ☞268.
Westlaw Key Number Search: 149Ek268.

34A-1-23. Particular manufacturer not to be favored by requirements

Nothing in § 34A-1-19 or 34A-1-21 shall be construed to authorize the board to require the use of machinery, devices, or equipment from a particular supplier or produced by a particular manufacturer, if the required performance standards may be met by machinery, devices, or equipment otherwise available.

Source: SL 1970, ch 203, § 7; SDCL Supp, § 34-16A-28.

Library References

Environmental Law ☞266, 275.
Westlaw Key Number Searches: 149Ek266;
149Ek275.

34A-1-24. Application for variance from rules

Any person who owns or is in control of any plant, building structure, process, or equipment may apply to the board for a variance from rules governing the quality, nature, duration, or extent of emissions. The application shall be accompanied by such information and data as the board may require. However, no variance may be granted for any facility subject to Title V of the

Cross References

Joint exercise of governmental powers, see § 1-24-1 et seq.
 Subpoena and administration of oaths to witnesses, see § 1-26-19.1.

Library References

Environmental Law ¶249, 256.
 Westlaw Key Number Searches: 149Ek249;
 149Ek256.

34A-1-38. Control of air contaminant sources beyond capability of local authority

If the board finds that the control of a particular class of air contaminant source is beyond the reasonable capability of the local or county air pollution control authorities, the department may assume and retain jurisdiction over that class of air contaminant source.

Source: SL 1970, ch 203, § 14; SDCL Supp, § 34-16A-43.

Library References

Environmental Law ¶249, 256.
 Westlaw Key Number Searches: 149Ek249;
 149Ek256.

34A-1-39. Civil action for violation of requirements—Penalty—Liability for damages to environment—Jury trial

Any person subject to this section is liable for a civil penalty not to exceed ten thousand dollars per day of violation or for damages to the environment of the state, or both. An action for the recovery of a civil penalty shall, upon demand, be tried to a jury.

Source: SL 1970, ch 203, § 15; SDCL Supp, § 34-16A-44; SL 1973, ch 222, § 7; SL 1977, ch 190, § 31; SL 1977, ch 280, § 13; SL 1988, ch 291, § 17; SL 1990, ch 283, § 2; SL 1992, ch 158, § 15.

Library References

Environmental Law ¶296.
 Westlaw Key Number Search: 149Ek296.

Research References**Treatises and Practice Aids**

Environmental Spill Reporting Handbook
 § 54:2.

34A-1-40. Investigations on board's own initiative—Petition by local board or electors

The board may upon its own initiative cause to be investigated the alleged pollution of the air or any other violation of this chapter including the violation of any regulations issued pursuant to this chapter, or such investigation shall be

made upon the verified petition of the governing body of any municipality or any municipal or county board of health or any fifteen electors of the state.

Source: SDCL, § 34-16A-11 as added by SL 1971, ch 204, § 1; SDCL Supp, § 34-16A-44.1; SL 1992, ch 60, § 2.

Commission Note

Section 2 of chapter 60 of the 1992 Session Laws changed the term "city" to "first class municipality" and "second class municipality" and changed the term "town" to "third class municipality". Section 2 also substituted "municipality" for "city or town" if the class of the municipality was not specified. The Code Commission has implemented this act in this section.

Cross References

Deposition of witnesses, see § 1-26-19.2.

Library References

Environmental Law ¶289, 295.
Westlaw Key Number Searches: 149Ek289;
149Ek295.

34A-1-41. Entry for inspection to determine compliance—Refusal of access prohibited

Any duly authorized officer, employee, or representative of the department may enter and inspect that part of any property, premise, or place in which he has reasonable grounds to believe is the source of air pollution at any reasonable time for the purpose of investigating the air pollution or of ascertaining the state of compliance with this chapter and rules and regulations in force pursuant thereto. No person shall refuse entry or access to any authorized representative of the department who requests entry for the purpose of such investigation, and who presents appropriate credentials; nor shall any person obstruct, hamper, or interfere with any such investigation.

Source: SL 1970, ch 203, § 8; SDCL Supp, § 34-16A-46; SL 1973, ch 222, § 8.

Cross References

Search warrants, see Const. Art. VI, § 11 and § 23A-35-1 et seq.

Library References

Searches and Seizures ¶79. C.J.S. Searches and Seizures §§ 99 to 101,
Westlaw Key Number Search: 349k79. 189.

34A-1-42. Report of inspection furnished to owner or operator

If requested, the owner or operator of the premises inspected pursuant to § 34A-1-41 shall receive a report setting forth all the facts found which relate to compliance status.

Source: SL 1970, ch 203, § 8; SDCL Supp, § 34-16A-47.

34A-1-43. Hearings by board—Procedural powers

In addition to any other powers conferred on it by law the board shall have power to hold hearings relating to any aspect of or matter in the administration

AIR P

of this
chapte

Source
1972, c

Subpoen

Enviro
Westla

34A-1-

In ad
power t
this cha
proceed

Source:

Environ
Westlaw

34A-1-
emis

Any of
finds that
pollution
or safety
secretary
ately the
effective i
and any j
immediate

Source: SL

Environme
Westlaw K

34A-1-40

Upon the
served purs
Following
or set aside

Source: SL
ch 15, § 4.

AIR POLLUTION CONTROL

§ 34A-1-46

of this chapter, and in connection therewith, exercise the powers granted by chapter 1-26.

Source: SL 1970, ch 203, § 5 (2); SDCL Supp, § 34-16A-48; revised pursuant to SL 1972, ch 15, § 4.

Cross References

Subpoena powers and taking of depositions, see §§ 1-26-19.1 and 1-26-19.2.

Library References

Environmental Law ¶293.
Westlaw Key Number Search: 149Ek293.

34A-1-44. Issuance and enforcement of orders

In addition to any other powers conferred on it by law the board shall have power to issue such orders as may be necessary to effectuate the purposes of this chapter and enforce the same by all appropriate administrative and judicial proceedings.

Source: SL 1970, ch 203, § 5 (3); SDCL Supp, § 34-16A-49.

Library References

Environmental Law ¶295.
Westlaw Key Number Search: 149Ek295.

34A-1-45. Emergency order for immediate reduction or discontinuance of emissions

Any other provisions of law to the contrary notwithstanding, if the secretary finds that any person is causing or contributing to air pollution and that such pollution creates an emergency by causing imminent danger to human health or safety and requires immediate action to protect human health or safety, the secretary shall order such person or persons to reduce or discontinue immediately the emission of air contaminants. Such emergency order shall become effective immediately on service upon person or persons responsible therefor and any person to whom such an order is directed shall comply therewith immediately.

Source: SL 1970, ch 203, § 11; SDCL Supp, § 34-16A-50.

Library References

Environmental Law ¶295.
Westlaw Key Number Search: 149Ek295.

34A-1-46. Hearing requested on emergency order—Action by board

Upon the request for a hearing by any person or persons named in an order served pursuant to § 34A-1-45, the secretary shall proceed under chapter 1-26. Following the completion of such proceedings, the board shall affirm, modify or set aside the order of the secretary.

Source: SL 1970, ch 203, § 11; SDCL Supp, § 34-16A-51; revised pursuant to SL 1972, ch 15, § 4.

AIR POLLUTION CONTROL

§ 34A-1-52

consent agreement instead of initiating proceedings under § 34A-1-47. Any consent agreement shall be approved by the board.

Source: SL 1970, ch 203, § 10; SDCL Supp, § 34-16A-55; revised pursuant to SL 1972, ch 15, § 4; SL 1977, ch 280, § 16.

Cross References

Contested case procedure, see § 1-26-16 et seq.

Subpoena powers and witness fees in administrative proceedings, see § 1-26-19.1.

34A-1-50. Board orders after hearing

If, after proceedings held pursuant to § 34A-1-48 or 34A-1-49, the board finds that a violation or violations have occurred, it shall affirm or modify any order previously issued under § 34A-1-47 by the board chairman, or issue an appropriate order or orders for the prevention, abatement, or control of the emissions or air pollution involved. If, after proceedings on an order contained in a notice the board finds that no violation is occurring, it shall rescind the order.

Source: SL 1970, ch 203, § 10; SDCL Supp, § 34-16A-57; SL 1977, ch 280, § 17.

Library References

Environmental Law ⇨293.

Westlaw Key Number Search: 149Ek293.

34A-1-51. Time allowed for corrective action in board order

Any order issued as part of a notice or after proceedings under chapter 1-26 shall prescribe the date or dates by which the violation or violations shall cease and may prescribe timetables for necessary action in preventing, abating, or controlling the emissions of air pollution.

Source: SL 1970, ch 203, § 10; SDCL Supp, § 34-16A-58.

Library References

Environmental Law ⇨293, 295.

Westlaw Key Number Searches: 149Ek293;
149Ek295.

34A-1-52. Enforcement remedies not barred by actions for penalties

Action pursuant to § 34A-1-39 or the second paragraph of § 34A-1-14 shall not be a bar to enforcement of this chapter or rules in force pursuant thereto, and orders made pursuant to this chapter by injunction or other appropriate remedy.

Source: SL 1970, ch 203, § 15; SDCL Supp, § 34-16A-59; SL 1977, ch 280, § 18.

Library References

Environmental Law ⇨295, 296.

Westlaw Key Number Searches: 149Ek295;
149Ek296.

and other natural resources or the public trust therein from pollution, impairment, or destruction.

Source: SL 1973, ch 144, § 5 (1); SDCL Supp, § 21-10A-11.
See Mich Comp Laws 1970, § 691.1204 (1).

34A-10-12. Apportionment of costs

Costs may be apportioned to the parties if the interests of justice require.

Source: SL 1973, ch 144, § 4 (3); SDCL Supp, § 21-10A-12.
See Mich Comp Laws 1970, § 691.1203 (3).

34A-10-13. Collateral estoppel—Res judicata

The doctrines of collateral estoppel and res judicata shall be applied by the court to prevent multiplicity of suits.

Source: SL 1973, ch 144, § 6 (3); SDCL Supp, § 21-10A-13.
See Mich Comp Laws 1970, § 691.1205 (3).

Cross References

Res judicata as affirmative defense, see § 15-6-8(c).

34A-10-14. Chapter supplementary to other procedures

This chapter shall be supplementary to existing administrative and regulatory procedures.

Source: SL 1973, ch 144, § 7; SDCL Supp, § 21-10A-14.
See Mich Comp Laws 1970, § 691.1206.

Cross References

Air pollution control, see § 34A-1-1 et seq.
Water pollution control, see § 34A-2-1 et seq.

34A-10-15. Citation of chapter

This chapter shall be known and may be cited as the "South Dakota Environmental Protection Act of 1973."

Source: SL 1973, ch 144, § 1; SDCL Supp, § 21-10A-15.
See Mich Comp Laws 1970, § 691.1201.

34A-10-16. Enforcement action by department

The department need not exhaust its administrative remedies, if any exist, before commencing any action to enforce the provisions of Title 34A, 45, or 46.

Source: SL 1991, ch 288, § 17.

Library References

Environmental Law ¶665.
Westlaw Key Number Search: 149Ek665.

CHAPTER 21-8 INJUNCTION

Section

- 21-8-1. Kinds of injunctive relief.
- 21-8-2. Purposes for which injunction prohibited.
- 21-8-3. Provisional writ abolished—Temporary restraining order and preliminary injunction substituted.
- 21-8-4, 21-8-5. Repealed.
- 21-8-6. Restraining order or preliminary injunction to prevent disposal of property during pendency of action.
- 21-8-7. Notice required before restraining order or preliminary injunction to suspend corporate business.
- 21-8-8. Repealed.
- 21-8-9. Pleading in lieu of affidavit for restraining order or preliminary injunction—Service of pleading and affidavit.
- 21-8-10, 21-8-11. Repealed.
- 21-8-12. Order granting restraining order or preliminary injunction.
- 21-8-13. Repealed.
- 21-8-14. Circumstances permitting grant of permanent injunction.
- 21-8-15. Permanent injunction by judgment or decree in civil action—Procedure.
- 21-8-16. Judicial power to restrain or enjoin violations of obscenity laws.
- 21-8-17. Notice and trial before injunction to enforce obscenity laws—Orders to deliver and destroy obscene matter.
- 21-8-18. Sale of obscene matter to adults not to be enjoined—Destruction not ordered unless matter disseminated to minors.

Cross References

- Attachment of property pending litigation, see § 21-17A-1 et seq.
- Original proceedings in Supreme Court, action for injunctions, see § 15-25-1 et seq.
- Preliminary injunctions and temporary restraining orders, prior notice requirements, see §§ 15-6-65(a) and 15-6-65(b).
- Preliminary injunctions and temporary restraining orders, undertaking required for issuance, see § 15-6-65(c).
- Stay of proceedings, appeal does not stay injunction unless ordered, see § 15-6-62(a).

United States Code Annotated

Injunctions, stay of state court proceedings, see 28 U.S.C.A. § 2283.

21-8-1. Kinds of injunctive relief

Relief by injunction is either temporary or permanent. Temporary injunctions may be referred to as interlocutory injunctions, and are either temporary restraining orders or preliminary injunctions. Permanent injunctions may be referred to as final injunctions.

Source: CivC 1877, § 2014; CL 1887, § 4647; RCivC 1903, § 2359; RC 1919, § 2032; SDC 1939 & Supp 1960, § 37.4301; SL 1978, ch 155, § 5.

Library References

- Injunction ¶1, 132, 150, 189.
- Westlaw Key Number Searches: 212k1; 212k132; 212k150; 212k189.
- C.J.S. Injunctions §§ 2 to 6, 10, 12, 14, 16 to 17, 22, 24, 166, 168, 189, 235 to 236, 245