



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
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denr.sd.gov

February 5, 2016

Honorable James M. Inhofe, Chairman
U.S. Senate Committee on Environment and Public Works
Washington, D.C. 20510-6175

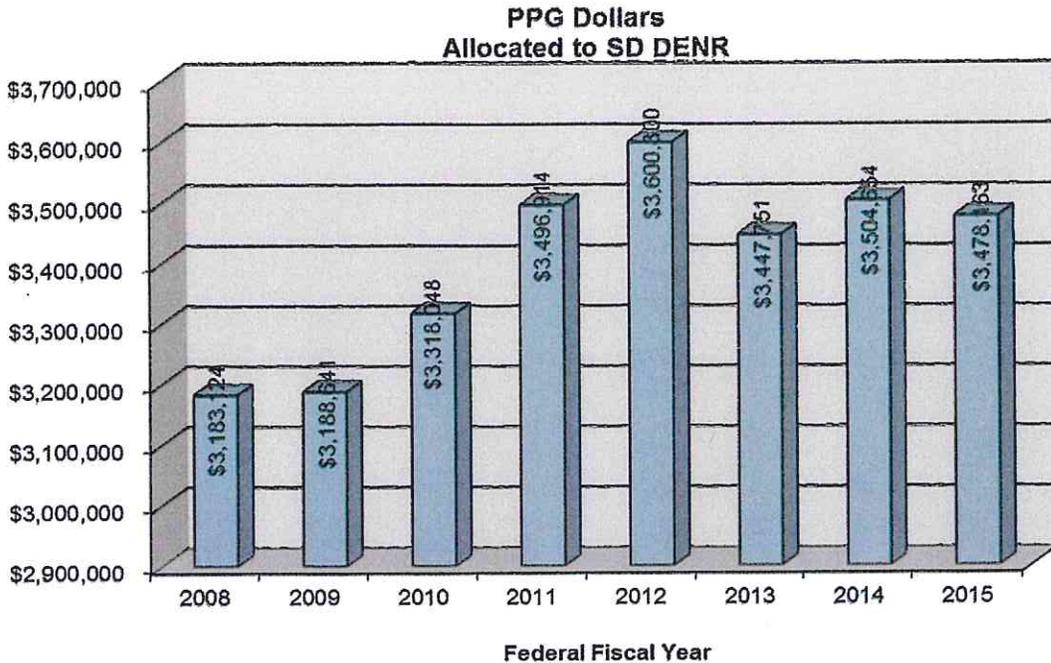
Dear Senator Inhofe:

Thank you for your January 12, 2016, letter requesting feedback on the state resources and efforts necessary to comply with EPA regulatory actions, and whether the current regulatory framework between EPA and the states upholds the principle of cooperative federalism. The short answer is no, the current framework does not uphold the principle of cooperative federalism, but our answer extends beyond EPA to encompass other federal agencies that we deal with as well.

To better understand our response, we need to put the South Dakota Department of Environment and Natural Resources (DENR) into some context for you. DENR is a small state department with only 180.5 authorized FTE. However, DENR's functions are incredibly diverse as we have delegation of nearly all the federal environmental acts from the U.S. Environmental Protection Agency (EPA) such as the Clean Water Act, Clean Air Act, and the Safe Drinking Water Act. In addition, we administer nearly all the environmental protection functions authorized by state law such as the state water planning process, regulation of minerals and mining to include oil and gas, the water appropriation or water rights process, and groundwater protection programs.

With the mix of federal and state programs we administer, DENR's state budget authority consists of 27 percent of state general funds and 39 percent of various fees collected to support administration of the programs that we administer. Fees collected to help support the federal environmental programs include surface water discharge permit (i.e. NPDES) fees, Title V air quality fees, SARA Title III Community Right to Know fees, drinking water fees, and state revolving fund program fees. That leaves 34 percent of our operating budget reliant upon federal funds.

The majority of our federal regulatory program funds are awarded by EPA through a Performance Partnership Agreement (PPG). This agreement includes federal regulatory program funds awarded under the Clean Water, Clean Air, Drinking Water, and Resource Conservation and Recovery Acts. The chart on the following page shows the total amount of federal funds awarded to us through the agreement during the last eight years. While there was some increase early on to reflect new federal responsibilities, the trend the last three years has been down. Consequently, federal EPA funding certainly has not kept up with state salary policies and other operating costs which have been increasing as well. This decreasing trend in federal EPA regulatory grant dollars is of grave concern and is certainly inverse to the huge increase in federal requirements for the delegated programs.



Of equal concern is the deluge of federal attacks on state rights. We have enclosed 15 one-page summaries of specific new federal requirements being thrust upon the state. While the majority of these are coming from EPA, we have also included one from the U.S. Army Corps of Engineers and one from the U.S. Forest Service. The bottom line is nearly all of these new federal requirements will have a tremendous impact on the State of South Dakota, its citizens, and its economy, but will produce little or no benefits in protecting public health and the environment in South Dakota. Due to the limited benefits, we would argue these new requirements do not rise to the level of requiring federal imposition upon all 50 states, but each state should have the responsibility and freedom to address these issues individually, using the principles of cooperative federalism and Executive Order 13132 on Preemption. That is clearly not the case now.

It is hoped this information is useful to you and your committee. Thank you again for the invitation to share it with you.

Sincerely,

Steven M. Pirner, PE
Secretary

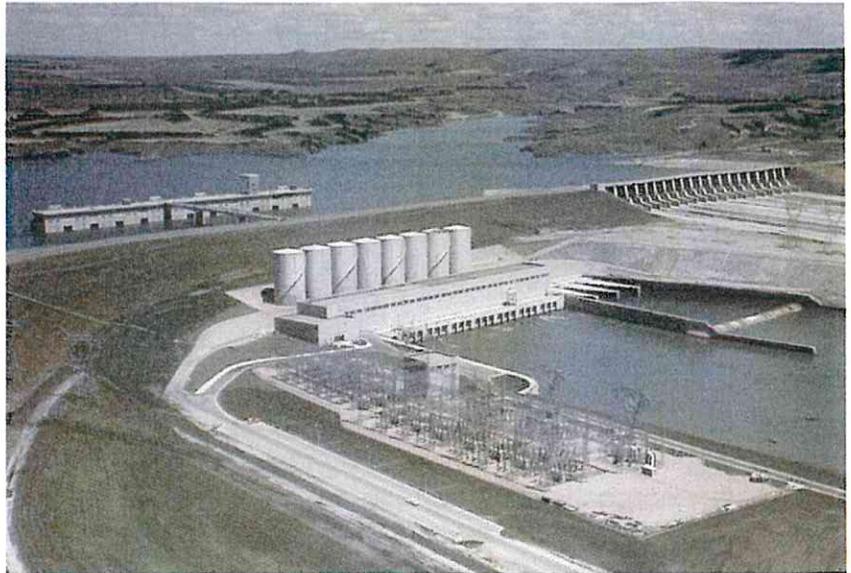
Enclosure: New Federal Requirements

cc: Honorable Senator Barbara Boxer, Ranking Member
Honorable Senator John Thune
Honorable Senator Michael Rounds
Honorable Congresswoman Kristi Noem
Governor Dennis Daugaard, State of South Dakota
Attorney General Marty Jackley, State of South Dakota

DENR Dealing with New Federal Requirements

Title: U.S. Army Corps of Engineers — Missouri River Surplus Water Reports, Reallocation Study, and nationwide rule-making

Date Proposed: Proposed surplus water reports and the reallocation study were to be completed by the summer of 2015. In 2014, the Corps suspended work on drafting the reallocation study pending a review by the Assistant Secretary of the Army and a final decision to issue the surplus water reports.



Short Description: In 2008, the Corps issued Real Estate Policy Guidance Letter No. 26 which led to a federal moratorium on issuing access easements installing water intakes into all Missouri River reservoirs. The moratorium includes easements for intakes for municipal, industrial, and rural water systems, but not for irrigation intakes. The Corps intends to require water supply contracts for the use of all “*stored water*” by municipal and industrial water users before any easements are granted. Under this new policy, the Corps is considering all water diverted directly from the reservoirs to be federal “*stored water*.” This new classification eliminates recognition of any “*natural flow water*” through the reservoirs which has traditionally been considered water under the jurisdiction of states and state water rights. The Corps also intends for the Missouri River studies to become the national model to be implemented through rule-making for all of its reservoirs in the United States.

Impacts to South Dakota: This is a major issue for South Dakota because nearly all of our Missouri River water is contained in the Corps reservoirs. By declaring all water in the reservoirs as federal “*stored water*,” the Corps is essentially taking all of our Missouri River water by eliminating “*natural flow water*” in the reservoirs. After strong objections by South Dakota and North Dakota along with other western states, as of August 2014, the Corps placed further public efforts on the surplus reports, reallocation study and nationwide rulemaking on hold while reevaluating issues internally.

Lawsuits DENR has Joined: None yet.

Link to Federal Explanation/Summary: <http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning/PlanningProjects/MissouriRiverMIWaterReallocationStudy.aspx>

Title: U.S. Forest Service — Agency Directive on Groundwater Resource Management

Date Proposed: Proposed on May 2, 2014; withdrawn on June 19, 2015

Short Description: The U.S. Forest Service proposed a directive with the intent to strengthen the agency's management of groundwater resources and the use of best management practices to improve and protect water quality on national forests and grasslands. Specifically, the proposal provided direction on the consideration of groundwater resources in agency activities, approvals, and authorizations; encouraged source water protection and water conservation; established procedures for reviewing new proposals for groundwater withdrawals on Forest Service lands; required the evaluation of potential impacts from groundwater withdrawals on Forest Service resources and surrounding land; and provided for measurement and reporting of larger groundwater withdrawals.



Impacts to South Dakota: The proposed directive attempted to insert the federal agency into the state water right process and exert authority over the allocation and appropriation of groundwater with no federal authority to do so. South Dakota law provides a process for parties, including the Forest Service, to intervene by petition on any water right application, but the proposed directive was a means for the Forest Service to circumvent the state process. It was another effort to federalize state water by delaying a permitting process or preventing the use of the state's groundwater both on and in areas surrounding Forest Service lands. No federal court has recognized a federal reserved water right to groundwater or authority to regulate ground water although the proposal directed Forest Service personnel to insert federal doctrines, laws, and policies into a state process. To their credit, the Forest Service withdrew their directive for further evaluation.

Lawsuits DENR has Joined: None

Link to Federal Proposal: <http://www.fs.fed.us/geology/Templates/Groundwatertemplate.dwt>

Withdrawal notice: <https://www.federalregister.gov/articles/2015/06/19/2015-15151/proposed-directive-on-groundwater-resource-management-forest-service-manual-2560>



DENR Dealing with New Federal Requirements

Title: Clean Water Act – Waters of the United States Rule

Date: Final Rule published June 29, 2015; effective August 28, 2015

Short Description: EPA and the U.S. Army Corps of Engineers developed a rule intending to clarify and define which waterbodies are Waters of the United States, and therefore subject to jurisdiction under the federal Clean Water Act. The rule has faced substantial opposition from our Congressional delegation and the agricultural community.



Impacts to South Dakota: The permitting requirements under the federal Clean Water Act have not changed, but EPA and the Corps have changed the definition of what constitutes waters of the United States. With the new rule, EPA and the Corps are setting boundaries and specifying distances from waterbodies where they will regulate the discharge of pollutants. Businesses, developers, homeowners, and others will be required to obtain a permit for disturbing wetlands or other waterbodies. EPA has stated that its existing exemptions for agricultural activities remain in place. However, producer groups and others opposed believe the rule represents a broad expansion of the types of waters that would be subject to federal permit requirements, limiting farming practices and other land-uses.

Lawsuits DENR has Joined: Attorney General Marty Jackley joined a lawsuit with North Dakota and 11 other states to block the rule, largely on a state's right basis — see <http://farmanddairy.lyleprintingandp.netdna-cdn.com/wp-content/uploads/2015/06/1-main.pdf?e694b2> "Our concerns continue to be that these agencies are overstepping their Congressional authority and that our State will be losing considerable decision making control over our waters and land use," said Jackley. A preliminary Injunction hearing was held in Fargo on Friday, August 21, 2015, and on August 27, 2015, Ralph R. Erickson, Chief District Judge, District of North Dakota, granted the injunction to the 13 states on the lawsuit. A stay has since been granted nationwide.

Links to Federal Explanation/Summary:

Rule: <http://www2.epa.gov/cleanwaterrule/final-clean-water-rule>

EPA's explanation of what the rule does:
<http://www2.epa.gov/cleanwaterrule/what-clean-water-rule-does>

EPA's explanation of what the rule does not do:
<http://www2.epa.gov/cleanwaterrule/what-clean-water-rule-does-not-do>

Title: Clean Water Act – Ammonia
Water Quality Criteria

Date Proposed: Final rules
published April 2013

Short Description: There are existing water quality standards for ammonia, NH₃, because it can be toxic to fish. EPA proposed this more stringent update to the freshwater ammonia aquatic life ambient water quality criteria to protect several freshwater mussel species that had not been tested previously.



Impacts to South Dakota: Ammonia is a common constituent in municipal wastewater. The new criteria are more stringent and will result in increased costs to municipalities to meet. Smaller towns that rely on discharging sewage lagoons or ponds for wastewater treatment may not be able to meet these new criteria. If this happens, small communities will either have to expend substantial funds to build enough ponds to become total retention facilities that do not discharge or construct complex mechanical treatment plants that will have high operation and maintenance costs. Larger cities that already have mechanical wastewater treatment plants with processes to remove ammonia will likely have to be enlarged at a high capital cost.

Lawsuits DENR has Joined: None; DENR is exploring options for implementing these new criteria that protect sensitive species yet result in appropriate, achievable ammonia limits for our communities.

Link to Federal Explanation/Summary:

<http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/ammonia/>

DENR Dealing with New Federal Requirements

Title: Clean Water Act –
Nutrient
Water Quality Criteria

Date Proposed: National nutrient criteria documents first published by EPA in 2000.

Short Description: Excess nutrients in waterbodies, such as nitrogen and phosphorus, can lead to excessive growth of algae and aquatic weeds because they act as fertilizers. Aquatic weeds can limit recreational uses of waterbodies and algal blooms can harm the aquatic ecosystem and even become toxic. For example, the “dead zone” in the Gulf of Mexico, the water quality problems in the Chesapeake Bay, and toxic algal blooms in the Great Lakes which have shut down drinking water systems have been widely reported and all blamed on high levels of nutrients. In response, EPA is putting pressure on states to adopt numeric standards for nutrients in all waters.



Impacts to South Dakota: Nutrient pollution in South Dakota has a definite adverse impact on our lakes, especially our shallow prairie lakes East River. DENR is working to reduce nutrient inputs to our lakes through no discharge requirements for cities and industries, nutrient management plans in feedlot permits, and providing financial assistance for reducing nonpoint source pollution through installing best management practices to reduce nonpoint source pollution in lake watersheds. Adverse effects from nutrients on our rivers and streams is limited, yet establishing numeric nutrient criteria as water quality standards would require municipalities and industries that discharge to our rivers and streams to invest in expensive upgrades to their wastewater treatment systems to treat and remove nutrients. This significant expenditure of funds spent on reducing nutrients from wastewater treatment systems that discharge to rivers and streams will have potentially no discernable improvement in water quality.

Lawsuits DENR has joined: None; DENR continues to work to address nutrient issues in ways that make sense for our state through cooperative funding programs and targeted watershed work. Numeric nutrient criteria and a one-size-fits-all approach will be expensive and ineffective for South Dakota.

Link to Federal Explanation/Summary: <http://www2.epa.gov/nutrientpollution>

Title: Clean Water Act –
Selenium Water Quality Criteria

Date Proposed: Rules proposed
on July 27, 2015

Short Description: Selenium
pollution was first widely reported
as a toxin when it was traced
back as the source of a rapid die-

off of migratory waterfowl, fish, insects, plants and algae in the Kesterson Reservoir in California in the 1980s. EPA established stringent water quality standards for selenium after that incident. EPA is now proposing an update to make the chronic freshwater selenium criterion even more stringent because selenium has been found to bio-accumulate in fish and people, meaning selenium builds up in a body when eaten. The new criterion has both water quality levels and allowable levels in fish flesh.



Impacts to South Dakota: The water quality criterion would decrease from 5.0 micrograms per liter (i.e. equivalent to parts per billion) of selenium to 1.2 micrograms per liter for lakes/ponds/reservoirs and 3.1 micrograms per liter for streams and rivers. Selenium is naturally-occurring in some parts of the state and will be difficult to control at these extremely low levels. Because a number of wastewater treatment systems in the state are already required to treat and remove selenium down to the 5.0 micrograms per liter level, the new more stringent criterion will result in increased treatment costs for these systems.

Lawsuits DENR has joined: None

Link to Federal Explanation/Summary:

<http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/selenium/>

Title: Clean Water Act – Effluent Limitations for Dental Offices

Date Proposed: October 22, 2014

Short Description: EPA is proposing technology-based standards for discharges of amalgam from dental practices. The proposed rules would require dental offices to reduce the discharge of mercury and other metals from dental amalgam into municipal wastewater sewer



systems. Under the proposal, dental offices would be required to install amalgam separators and use best management practices to keep mercury and metals from going down the drain. While mercury is a naturally-occurring element, it acts as a powerful neurotoxin in humans and wildlife. Mercury can bio-accumulate in fish and humans. Because of all these adverse health effects, this rule is intended to minimize one of the sources of mercury that is discharged into the environment.

Impacts to South Dakota: Under the proposal, any dental office that uses dental amalgam for fillings or removes old fillings will be required to either have an amalgam separator or demonstrate they are removing 99 percent of the mercury from waste streams going down the drain to the city sewer. The South Dakota Dental Association estimated that at least 300 dental offices in South Dakota will be impacted by this rule. The rule will be expensive to implement for many dental offices in spite of the fact that 99 percent of the mercury in South Dakota's water resources comes from atmospheric sources beyond our state borders. Therefore, this rule will provide no discernable improvement in water quality for South Dakota.

Lawsuits South Dakota has joined: None

Links to Federal Explanation and Summary:

Rule: <https://federalregister.gov/a/2014-24347>

EPA's Website Explaining the Rule: <http://water.epa.gov/scitech/wastetech/guide/dental/>

Title: Safe Drinking Water Act — Perchlorate Rule

Date Proposed: Proposed rule under development

Short Description: EPA has decided to regulate perchlorate under the Safe Drinking Water Act. This decision reverses a 2008 preliminary determination, and considers input from almost 39,000 public commenters on multiple public notices (May 2007, October 2008, and August 2009) related to perchlorate. Perchlorate is both a naturally occurring and man-made chemical that is used to produce rocket fuel, fireworks, flares and explosives. Perchlorate can also be present in bleach and in some fertilizers. Once the primary drinking water standard is finalized by EPA, certain public drinking water systems will be required to take action to comply with the regulation in accordance with the schedule specified in the regulation.

Perchlorate polluting drinking water

The most recent Environmental Protection Agency data list detections of perchlorate at hundreds of sites in 38 states. Perchlorate, a chemical used in rocket fuel, contaminates drinking water. It can interfere with the functioning of the thyroid, which affects development.

Perchlorate detected - City/Town/Village County State
(as of March 25)



SOURCE: Environmental Protection Agency

AP

Impacts to South Dakota: As shown by the map above, there were no detections of perchlorate in South Dakota drinking water systems when monitoring for perchlorate was conducted under the Unregulated Contaminant Monitoring Rule. Consequently, DENR submitted written comments when the rule was first proposed requesting that EPA not develop a national regulation for a pollutant that shows up in only some states. DENR continues to monitor this rule and will provide written comments to EPA after the proposed rule is published in the Federal Register. If the proposed rule does not include language for waivers for states where no perchlorate has been detected, DENR will again submit written comments requesting that a waiver provision be included so that states where no perchlorate has been detected do not have to develop a regulatory program for it and unnecessary monitoring costs are not incurred by drinking water systems in those states.

Lawsuits DENR has Joined: None

Link to the Federal Explanation/Summary:

<http://water.epa.gov/drink/contaminants/unregulated/perchlorate.cfm>

Title: Water Resources Reform and Development Act - Clean Water State Revolving Fund Amendments

Date: The Clean Water State Revolving Fund Amendments were tacked on to the 2014 Water Resources Reform and Development Act by Congress in mid-May with no advance notice to the states and the bill was signed into law by President Obama on June 10, 2014.



Short Description: The 2014 Water Resources Reform and Development Act made significant changes to the existing Clean Water State Revolving Fund program by amending Titles I, II, V, and VI of the Federal Water Pollution Control Act. The Act also created the new Water Infrastructure Finance and Innovation Authority.

Impacts to South Dakota: On the positive side, the amendments expanded some eligibilities of the Clean Water State Revolving Fund, primarily regarding land costs, decentralized wastewater systems, and stormwater management.

On the negative side, the following federal strings to the existing Clean Water State Revolving Fund program have now been codified by Congress and will likely stay in place forever for new projects receiving financial assistance through the program:

- buy only American iron and steel;
- requiring Davis-Bacon wage rates;
- loan recipients have to certify projects have been studied and selected that maximize the potential for water and energy conservation;
- principal forgiveness limited to recipients meeting an affordability criteria to be established by the state or for EPA sanctioned "green" projects; and
- new procurement process requirements for architectural and engineering services.

Lawsuits DENR has Joined: None

Link to Federal Explanation/Summary:

<https://www.govtrack.us/congress/bills/113/hr3080/text>

<https://www.congress.gov/bill/113th-congress/house-bill/3080>

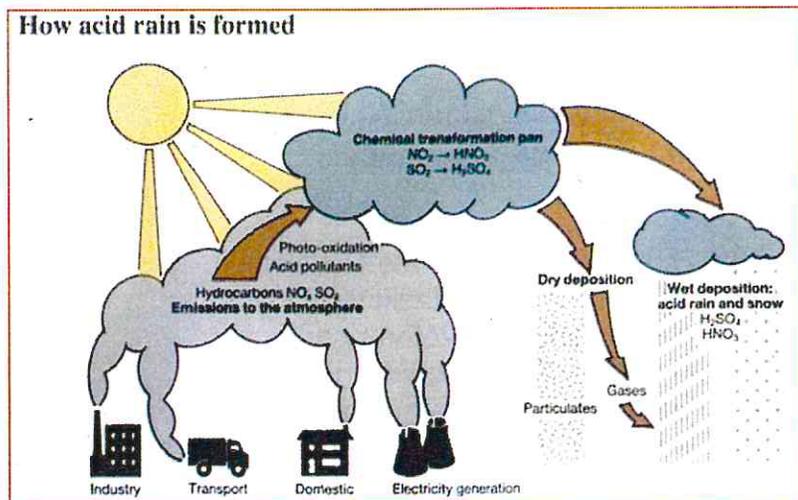
DENR Dealing with New Federal Requirements

Title: Clean Air Act — Consent Decree for 1-Hour Sulfur Dioxide Standard

Date: Filed March 2, 2015

Short Description: On June 22, 2010, EPA revised the National Ambient Air Quality Standard for sulfur dioxide and established a 1-hour standard. On June 2, 2011, DENR submitted its designation letter and documentation to support EPA

designating every county in South Dakota as attaining the new standard. The Sierra Club and other environmental groups sued EPA in California federal district courts over missing the deadline to set state designations for the 1-hour sulfur dioxide standard. The resulting consent decree establishes new deadlines to meet and requires South Dakota, along with other states, to submit additional designation letters. The first round of designation letters required by the consent decree involves counties with large emission sources of sulfur dioxide based on calendar year 2012. In South Dakota, only Grant County where the Big Stone Power Plant is located was listed in the consent decree. The second designation letter for Grant County was submitted September 16, 2015. To meet the consent decree's schedule, EPA is forcing states to use modeling to designate these areas because there is not enough time to monitor (three years baseline monitoring required) for sulfur dioxide and demonstrate compliance.



Impacts to South Dakota: DENR is opposed to using EPA's models because they over-predict air concentrations which may result in Grant County being designated as not attaining the 1-hour sulfur dioxide standard. Plus, this could set precedence for EPA forcing states to use models instead of actual, real-life ambient monitoring data for future designations. DENR has one year of sulfur dioxide monitoring data from the Grant County area showing no violations of the standard, but three years is needed to demonstrate attainment. DENR would not be required to do any of this if EPA took into account the new air pollution controls the Big Stone Power Plant installed at a cost of \$384 million. These new air pollution controls comply with the federal Regional Haze Program and will reduce sulfur dioxide emissions below the thresholds established in the consent decree.

Lawsuits DENR has Joined: Joined a lawsuit against EPA with North Dakota and other states, but it was stayed pending near identical litigation in the California federal district courts. The parties in California are appealing the district court's adoption of the consent agreement between EPA and the Sierra Club.

Link to Federal Explanation/Summary:

<http://www.epa.gov/airquality/sulfurdioxide/designations/data.html>

Title: Resource Conservation Recovery Act – Final Rule on Coal Combustion Residuals Generated by Electric Utilities

Date Proposed: Final rule published in Federal Register on April 17, 2015; effective date of October 19, 2015

Short Description: On June 21, 2010, EPA proposed regulations under the Resource Conservation Recovery Act to regulate for the first time coal combustion residuals (i.e. ash) generated from the combustion of coal at electric utilities and independent power producers. This was

prompted by the large liquid coal ash spill at the Tennessee Valley Authority power plant in Kingston, Tennessee in 2008. The new rules will create regulatory requirements related to: structural integrity for surface impoundments, ground water monitoring, liner design criteria, location restrictions, storm water and air quality operating requirements, record keeping and Internet posting, and closure and post closure.



Coal Ash Disposal Site at Big Stone Power Plant

Impacts to South Dakota: EPA's new rules are self-implementing meaning that regulated facilities must comply with the new rules without the engagement of federal or state regulatory authorities. States are not required to adopt the rules or develop a permitting program, but EPA is strongly encouraging states to do so. In the absence of a state program, enforcement of these federal rules will be by citizen suits (or by states acting as citizens). Currently, the only coal-fired power plant in South Dakota subject to the new rules is the Big Stone Power Plant near Milbank. DENR's Waste Management Program already regulates coal ash disposal at this facility through a solid waste permit. Because the new federal rules essentially preempt the existing state solid waste permit, DENR is continuing negotiations with EPA Region 8 to evaluate potential administrative rule changes to adopt the new federal requirements in the least disruptive manner.

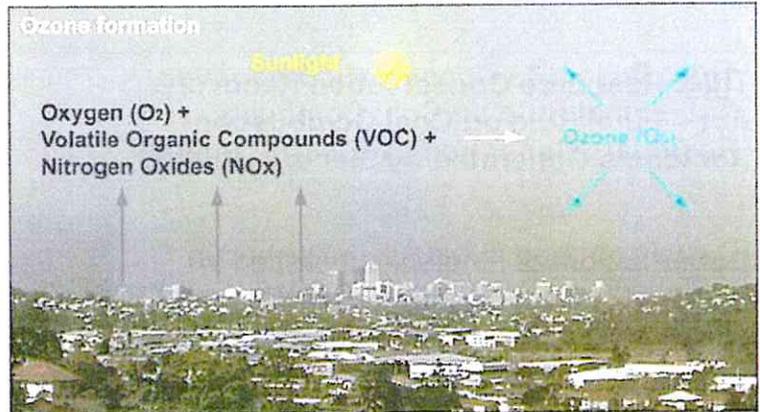
Lawsuits DENR has Joined: None

Link to Federal Explanation/Summary: <http://www2.epa.gov/coalash/coal-ash-rule>

Title: Clean Air Act — Revised National Ambient Air Quality Standard for Ozone

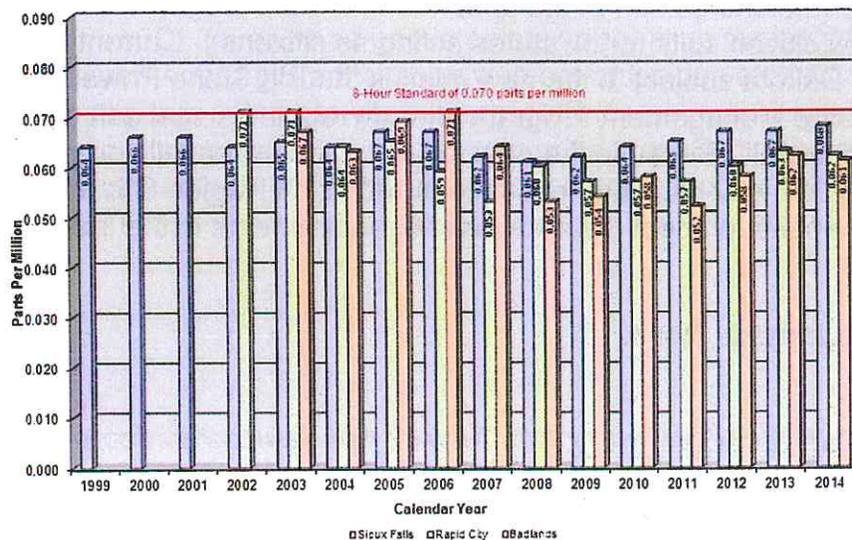
Dates: Proposed November 25, 2014; Final rule published October 26, 2015

Short Description: EPA used protecting public health as the basis to propose lowering the National Air Quality Standard for ozone from 0.075 parts per million to a new standard somewhere in a range of 0.060 to 0.070. The final rule established the level at 0.070 parts per million.



Impacts to South Dakota: The bar graph below shows ozone levels in South Dakota are below the old standard of 0.075 parts per million, but ozone levels at all monitoring stations are greater than 0.060 parts per million. There are few major sources of volatile organic compounds or nitrogen oxides in South Dakota which then reacts with sunlight to form ozone, so the sources of our existing ozone are either background or come from other states. Lowering of the ozone standard to 0.070 parts per million is better than 0.060 which would have placed some, if not all, of South Dakota in jeopardy of violating the new standard, but as the graph below shows, we are still in jeopardy of losing our status of being a state that meets all National Ambient Air Quality Standards everywhere in the state. A non-attainment status will increase DENR's workload, place economic hardships on businesses and communities in and near the areas violating the standard, and place federal highway funds in jeopardy.

Ozone Trends for South Dakota



Lawsuits DENR has Joined: None

Link to Federal Explanation/Summary: <http://www.epa.gov/airquality/ozonepollution/>

Title: Clean Air Act — State Implementation Plan Call on DENR's Startup, Shutdown, and Malfunction Exemption

Dates: Final rule issued June 12, 2015

Short Description: In response to a petition from the Sierra Club that argued affirmative defense and exemptions during start-up, shutdown, and malfunction events constitute a loophole that allows facilities to release air pollutants in excess of permit

limits, EPA issued a new rule that finds certain startup, shutdown, and malfunction exemptions in 36 states are substantially inadequate to meet the Clean Air Act requirements. To rectify the inadequacies, EPA's rule issued a "*State Implementation Plan Call*" that requires each of the 36 states to eliminate the exemption.



GCC Dacotah Cement Plant in Rapid City

Impacts to South Dakota: In South Dakota, the exemption allowed by DENR's rules allows for brief periods of visible emissions during periods of soot blowing, startups, shutdowns, and malfunctions. DENR's rule was first established in 1975, was approved by EPA, and has not caused or interfered with South Dakota staying in full compliance with all of the federal National Ambient Air Quality Standards. In fact, South Dakota is one of only 10 states in the nation that are in full attainment of all the federal national ambient air quality standards everywhere in the state. If South Dakota eliminates this exemption in accordance with EPA's "*State Implementation Plan Call*," industry will lose their affirmative defense and exemptions for brief periods of visible emissions during soot blowing, start-ups, shutdowns, and malfunctions. Consequently, environmental groups, citizens, and EPA could take legal action against facilities and small businesses that are unable to meet South Dakota's opacity limit of 20 percent during soot blowing, startups, shutdowns, or malfunctions, but there will be no discernible improvement in air quality.

Lawsuits DENR has Joined: On August 4, 2015, on behalf of DENR, Attorney General Marty Jackley joined Florida's lawsuit against EPA's "*State Implementation Plan Call*" along with 15 other states. "*We will not step aside while the EPA, through heavy-handed federal overreach, threatens to upend a system that the EPA has approved multiple times and has provided a consistent, reliable framework to safely provide electricity to millions of Floridians across the state,*" Florida Attorney General Pam Bondi said in a statement.

Link to Federal Explanation/Summary: Nothing available at this time.

DENR Dealing with New Federal Requirements

Title: Clean Air Act — Carbon Pollution Standards for new, modified, and reconstructed power plants

Date: EPA published the final regulation in the Federal Register on October 23, 2015.

Short Description: These rules regulate the greenhouse gas carbon dioxide from new, modified, and reconstructed power plants (e.g. construction after January 2014) designed to burn a fossil fuel (e.g. coal, natural gas).



Ben French coal-fired Power Plant in Rapid City

Impacts to South Dakota: Because these rules apply only to new, modified, and reconstructed power plants, there is no immediate impact to South Dakota. However, the final rule expects the use of carbon capture and sequestration systems to be used on new coal-fired power plants to meet the finalized emission limits. South Dakota commented during the public notice period that carbon capture and sequestration systems are not commercially available. For the foreseeable future, most of the electric power generating industry believe the effect of this rule will be a federal moratorium on the construction of new coal-fired power plants. If true, this rule will impact South Dakota by guaranteeing that Otter Tail's Big Stone II or Basin's Next-Gen coal-fired plant proposed near Selby will never be built.

Lawsuits DENR has Joined: On behalf of DENR, Attorney General Marty Jackley joined West Virginia's lawsuit against EPA along with 22 other states and state agencies.

Link to Federal Explanation/Summary:

<http://www.epa.gov/climatechange/>

<http://www2.epa.gov/cleanpowerplan/carbon-pollution-standards-new-modified-and-reconstructed-power-plants>

Title: Clean Air Act - 111(d) Clean Power Plan for Existing Plants

Date: EPA's Administrator, Gina McCarthy, signed the final 1,650-page rule on August 3, 2015, and it was published on October 23, 2015.



Big Stone coal-fired Power Plant

Short Description: This rule requires states to submit a plan to regulate greenhouse gases from existing power plants that burn a fossil fuel (e.g. coal, natural gas). The rule identifies four options:

1. Sub-category rate-based limit based on a two-year average starting in 2030:
 - a. Coal-fired steam generation = 1,305 pounds of carbon dioxide per net megawatt-hour.
 - b. Natural-gas fired turbine = 771 pounds of carbon dioxide per net megawatt-hour.
2. Statewide rate-based limit for all affected electric generating units of 1,167 pounds of carbon dioxide per net megawatt-hour based on a two-year average starting in 2030.
3. Mass-based limit of 7,078,962 short tons of carbon dioxide based on two-year blocks starting with 2030-2031.
4. EPA implements federal plan for states that do not submit a state plan.

Impacts to South Dakota: The EPA rules affect the Big Stone Plant near Milbank (shown above) and Deer Creek Station near White. DENR is taking the required steps to seek a two-year extension by the September 2016 deadline and submit a plan by September 2018.

Lawsuits DENR has Joined: SD Attorney General Marty Jackley joined the following lawsuits:

- Murray Energy Corp. petitioned the United States Court of Appeals for the District of Columbia Circuit for a writ of prohibition against the EPA for its proposed rule. Murray Energy Corp. asked the court to review EPA's statutory mandate and its authority to implement its proposed greenhouse gas regulations. South Dakota moved to intervene along with 26 other states. Arguments were heard on April 16, 2015; judgment was filed June 9, 2015 denying the writ.
- South Dakota joined with West Virginia and 11 other states in filing a petition challenging the legality of a 2010 finalized settlement agreement in which the EPA agreed to impose new regulations under 111(d) of the Clean Air Act upon existing coal-fired power plants. Arguments were held on April 16, 2015, before the same federal panel set to hear the Murray Energy petition. Judgment was filed on June 9, 2015, denying the petition filed by the states.
- South Dakota has also joined with West Virginia and approximately 26 other states in filing petitions for review directly challenging the published §111(d) regulation. Along with the petitions a Motion to Stay was filed that was recently denied by the D.C. Circuit Court of Appeals. Many states, including South Dakota, have alternatively sought a stay from the United States Supreme Court. The petitions for review are currently set to be argued before the D.C. Circuit Court of Appeals in early June, 2016. The case has been consolidated with approximately 25 others at last count.

Link to Federal Explanation/Summary: <http://www.epa.gov/climatechange/> and <http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants>