October 23, 2018

City of Rapid City  
300 Sixth Street  
Rapid City SD  57701

Rapid City:

West Dakota Water Development District filed a petition with the South Dakota Water Management Board to issue a declaratory ruling on the applicability of Administrative Rule of South Dakota (ARSD) 74:53:01:04. The petition included an affidavit of hand delivery of the petition upon Rapid City. For easy reference, I have enclosed the submitted petition.

A notice of hearing of the petition has been provided to the District for publication to schedule the petition for hearing on December 5, 2018. Pursuant to the ARSD 74:02:01:48, Rapid City is being notified by DENR that the petition is scheduled to be heard. Enclosed is the notice of hearing as provided to the District. We have suggested to the District that the notice of hearing be published November 7, 2018, in the Rapid City Journal, Aberdeen American News and Argus Leader.

Sincerely,

[Signature]
Eric Gronlund  
Water Rights Program, DENR  
605 773-3352  
Eric.gronlund@state.sd.us

enclosures
NOTICE OF HEARING ON PETITION FOR A DECLARATORY RULING REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA (ARSD) 74:53:01:04

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to South Dakota Codified Law (SDCL) 1-26-15, SDCL 46-2-5(4) and Administrative Rule of South Dakota (ARSD) 74:53:01:46. The names of the individuals submitting and signing the petition are Mike Mueller, Chairman and Jeanette Deurloo, Secretary, West Dakota Water Development District, 402 St. Joseph Street, Suite 6, Rapid City SD 57701.

The requested action stated in the petition is as follows:

A. Issue a declaratory ruling on whether or not ARSD 74:53:01:04 means what it appears to plainly state;
B. Whether or not ARSD 74:53:01:04 applies to other units of South Dakota government, specifically counties and cities;
C. Specifically, whether or not Pennington County may by ordinance effectively nullify the February 28, 1975 date in ARSD 74:53:01:04 by regulating on-site wastewater system: that have not been changed; that have not been shown to cause the groundwater to be polluted; or that have not allowed wastewater to surface; and
D. Specifically, whether or not Rapid City may by ordinance effectively nullify the February 28, 1975 date in ARSD 74:53:01:04 by regulating on-site wastewater system: that have not been changed; that have not been shown to cause the groundwater to be polluted; or that have not allowed wastewater to surface.

The reasons for the requested action is that a controversy exists in that:

1. SDCL 1-40-4.1 provides “No rule that has been promulgated pursuant to Title 34A, 45, 46 or 46A may be more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue.”
2. ARSD 74:53:01:04 provides: “On-site wastewater systems existing prior to February 28, 1975, are not subject to this chapter unless the systems are changed, the systems cause the groundwater to become polluted, or the systems are allowing waste water to surface. Abandoned wastewater systems are not exempt from this chapter and shall be abandoned in accordance with [section] 74:53:01:11.
3. Pennington County has enacted Ordinance Number 34, as amended, that among things requires all on-site wastewater systems, that by implication also applies to on-site wastewater systems existing before February 28, 1975, to be observed every six years, by a county approved private entity irrespective of: whether or not it has been changed; whether or not it has been shown to cause groundwater to be polluted; or whether or not it has allowed wastewater to surface;
4. Pennington County’s Ordinance Number 34, as Amended, makes it a crime punishable by a fine not to exceed Five Hundred Dollars or imprisonment not to exceed Thirty days in the county jail for a person found in violation of the ordinance and makes it a separate violation
for each day there is a violation.

5. Rapid City has enacted an ordinance, similar to Pennington County's ordinance, which among other things requires all on-site wastewater systems, that by implication also applies to on-site wastewater systems existing on February 28, 1975, to be observed, by a city approved private entity irrespective of: whether or not it has been changed; whether or not is has been shown to cause groundwater to be polluted; or whether or not it has allowed wastewater to surface;

6. Pennington County has vigorously enforced their ordinances and has required owners to comply under the threat of a criminal conviction, over the objections of the owners of on-site wastewater systems that their on-site wastewater system; has not been changed; has not been shown to be polluting groundwater; nor has wastewater surfaced, and that their on-site wastewater system has been in existence prior to February 28, 1975.

7. Rapid City has vigorously enforced their ordinance, not just for on-site wastewater system within the city limits, but also those within on mile of the city limits, and has required owners to comply, over the objections of the owners of on-site wastewater systems that their on-site wastewater system; has not been changed; has not been shown to be polluting groundwater; nor has wastewater surfaced, and their on-site wastewater system has been in existence prior to February 28, 1975:

8. While the court, when one of the county's alleged violation was being prosecuted has, in one instance, taken the position that if the alleged violator was convicted of non-compliance with the county's ordinance, that it did not intend to impose a jail penalty, nonetheless, that possibility remains in Pennington County's ordinance and future courts may not take the same position.

9. Several individuals located within the jurisdiction of West Dakota Water Development District have requested that the West Dakota Water Development District obtain a declaratory ruling from the South Dakota Water Management Board as to the applicability and pertinence of ARSD 74:53:01:04 and whether or not the same preempts Pennington Count and Rapid City from enacting a more restrictive ordinance, inasmuch as the South Dakota Water Management Board has dismissed two previous requests for a declaratory ruling from citizens within the jurisdiction of the West Dakota Water Development District.

10. The West Dakota Water Development District by letter dated March 29, 2018 requested a declaratory ruling from the South Dakota Water Management Board as to whether ARSD 74:53:01:04 actually means what is says, and West Dakota Water Development District has yet to receive a response to their request, or even acknowledgement that their request was made, necessitating this formal request based on the foregoing factual situation.

The applicable statutes providing general authority and implementing ARSD 74:53:01:04 are SDCL 34A-2-93, 34A-2-20 and 34A-2-21.

The petition for a declaratory ruling will be considered by the Water Management Board at 1:00 PM on Wednesday, December 5, 2018, at the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The Board may issue one of the following decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) issue declaratory rulings on the four requested actions set forth in A through D; 2) take other action as the Board deems warranted after hearing the evidence presented; 3) defer action; or 4) take no action.
Any person intending to participate in the hearing before the Board by presenting evidence or cross-examining witnesses according to SDCL 1-26, shall by November 26, 2018, file a written petition to oppose or support the declaratory ruling request set forth in West Dakota Water Development District’s petition. The petition shall be filed with the Chief Engineer and West Dakota Water Development District. The Chief Engineer’s address is “Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605) 773-3352”; and West Dakota Water Development District’s address is given above. The petition may be informal but must include a statement describing the petitioner’s interest in the petition for a declaratory ruling, the petitioner’s reasons for opposing or supporting the petition for declaratory ruling, and the signature and mailing address of the petitioner or the petitioner’s legal counsel, if legal counsel is obtained. West Dakota Water Development District is a party to the hearing and need not file a petition to intervene. The December 5, 2018 hearing date will be automatically delayed for at least 20 days upon written request of West Dakota Water Development District or any person who has filed a timely petition to oppose or support the request for declaratory ruling. The request for an automatic delay must be filed by November 26, 2018.

This hearing is an adversary proceeding. Any person filing a petition, including West Dakota Water Development District, has the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by November 26, 2018, at the above Water Rights Program address to request copies of information pertaining to this petition for declaratory ruling. The declaratory ruling, public notice, and any subsequent filings may also be found on DENR’s website at http://denr.sd.gov/des/wr/pubnotice.aspx. Please notify DENR at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing.

Under SDCL 1-26-18.3, in any contested case, if the amount in controversy exceeds $2,500.00 “or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL 1-26-17.” If you choose to use the Office of Hearing Examiners rather than the hearing procedure before the Water Management Board set forth above, you need to notify the Chief Engineer (Water Rights Program, 523 E Capitol Avenue, Pierre SD) by November 19, 2018.

This petition for a declaratory ruling is made pursuant to Board General Rules, Sections 74:02:01:46 thru 74:02:01:49. The Board has legal authority and jurisdiction to consider this matter pursuant to SDCL 46-2-5, 46-2-9, 46-2-11, and 34A-2-93. Steven M Pirner, Secretary, Department of Environment and Natural Resources.
West Dakota Water Development District hereby Petitions the South Dakota Water Management Board to issue a decision (Declaratory Ruling) on the applicability of ARSD 74:53:01:04 pertaining to the factual situation as hereinafter provided:

(1) The authority by which the petition is presented: SDCL 1-25-15, SDCL 46-2-5 (4), and ARSD 74:02:01:46.

(2) The name of the person, agency, or groups submitting the petition: West Dakota Water Development District.

(3) The requested action:
A. Issue a Declaratory Ruling on whether or not ARSD 74:53:01:04 means what it appears to plainly state;
B. Whether or not ARSD 74:53:01:04 applies to other units of South Dakota government, specifically counties and cities;
C. Specifically, whether or not Pennington County may by ordinance effectively nullify the February 28, 1975 date in ARSD 74:53:01:04 by regulating on-site wastewater systems: that have not been changed; that have not been shown to cause the groundwater to be polluted; or that have not allowed wastewater to surface; and
D. Specifically whether or not Rapid City may by ordinance effectively nullify the February 28, 1975 date in ARSD 74:53:01:04 by regulating on-site wastewater systems: that have not been changed; that have not been shown to cause the groundwater to be polluted; or that have not allowed wastewater to surface;
And the reasons for the requested action is that a controversy exists in that:

A. SDCL 1-40-4.1 provides:

“No rule that has been promulgated pursuant to Title 34A, 45, 46, or 46A may be more stringent than any corresponding federal, law, rule, or regulation governing an essentially similar subject or issue.”

B. ARSD 74:53:01:04 provides:

“On-site wastewater systems existing prior to February 28, 1975, are not subject to this chapter unless the systems are changed, the systems cause the groundwater to become polluted, or the systems are allowing waste water to surface. Abandoned wastewater systems are not exempt from this chapter and shall be abandoned in accordance with [section] 74:53:01:11.

C. Pennington County has enacted Ordinance Number 34, as Amended, that among other things requires all on-site wastewater systems, that by implication also applies to on-site wastewater systems existing before February 28, 1975, to be observed every six (6) years, by a county approved private entity irrespective of: whether or not it has been changed; whether or not it has been shown to cause groundwater to be polluted; or whether or not it has allowed wastewater to surface;

D. Pennington County’s Ordinance Number 34, as Amended, makes it a crime punishable by a fine not to exceed Five Hundred Dollars ($500) or imprisonment not to exceed Thirty (30) Days in the county jail for a person found in violation of the ordinance and makes it a separate violation for each day there is a violation;

E. Rapid City has enacted an ordinance, similar to Pennington County’s ordinance, which among other things requires all on-site wastewater systems, that by implication also applies to on-site wastewater systems existing on February 28, 1975, to be observed, by a city approved private entity irrespective of: whether or
not it has been changed; whether or not it has been shown to cause groundwater to be polluted; or whether or not it has allowed wastewater to surface;
F. Pennington County has vigorously enforced their ordinance and has required owners to comply under the threat of a criminal conviction, over the objections of the owners of on-site wastewater systems that their on-site wastewater system: has not been changed; has not been shown to be polluting groundwater; nor has wastewater surfaced, and that their on-site wastewater system has been in existence prior to February 28, 1975;
G. Rapid City has vigorously enforced their ordinance, not just for on-site wastewater systems within the city limits, but also those within one (1) mile of the city limits, and has required owners to comply, over the objections of the owners of on-site wastewater systems that their on-site wastewater system: has not been changed; has not been shown to be polluting groundwater; nor has wastewater surfaced, and their on-site wastewater system has been in existence prior to February 28, 1975;
H. While the court, when one of the county's alleged violations was being prosecuted has, in one instance, taken the position that if the alleged violator was convicted of non-compliance with the county's ordinance, that it did not intend to impose a jail penalty, nonetheless, that possibility remains in Pennington County's ordinance and future courts may not take the same position;
I. Several individuals located within the jurisdiction of the West Dakota Water Development District have requested that the West Dakota Water Development District obtain a declaratory ruling from the South Dakota Water Management Board as to the applicability and pertinence of ARSD 74:53:01:04 and whether or not the same preempts Pennington County and Rapid City from enacting a more restrictive ordinance, inasmuch as the South Dakota Water Management Board has dismissed two (2) previous requests for a declaratory ruling from citizens within the jurisdiction of the West Dakota Water Development District; and
J. The West Dakota Water Development District by letter dated March 29, 2018 requested a declaratory ruling from the South Dakota Water Management Board as to whether ARSD 74:53:01:04 actually means what it says, and West Dakota Water Development District has yet to receive a response to their request, or even acknowledgement that their request was made, necessitating this formal request based on the foregoing factual situation.

(5) The signature of the person or the authorization of the group or agency making the Petition: Mike Mueller, Chairman, and Jeanette Deurloo, Secretary, of the West Dakota Water Development District, as authorized by motion made and seconded and passed by a majority of the Directors on the 10th day of July, 2018.

Dated this 28th day of August, 2018.

West Dakota Water Development District

By: ____________________________
Mike Mueller

Its: Chairman

And

By: ____________________________
Jeanette Deurloo

Its: Secretary