

**COOPERATIVE ENFORCEMENT AGREEMENT
BETWEEN THE
SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
AND THE
U.S. ENVIRONMENTAL PROTECTION AGENCY**

I. PURPOSE AND SCOPE

The purpose of this agreement is to (1) establish and provide for the coordination and consultation on State and EPA enforcement activities, and (2) define the basic oversight criteria for timely and appropriate enforcement actions by the State. It is understood that the State has primary responsibility for the Surface Water Discharge System (SWDS) compliance and enforcement actions in South Dakota. It is further understood that this agreement does not limit EPA's enforcement authority [CWA § 402 (i)] and EPA has certain oversight responsibilities with respect to these activities, but the degree of oversight conducted by EPA shall be subject to modification on the basis of the performance of the State's SWDS enforcement program.

II. NONCOMPLIANCE CONSULTATION AND COORDINATION

The State reviews all appropriate compliance information from all permittees, and prepares and submits to EPA the Quarterly Noncompliance Report (QNCR). As an additional oversight provision, EPA, Region VIII, reviews selected compliance information. When appropriate, EPA will notify the State by telephone where significant noncompliance (SNC) is found along with all documentation EPA has regarding the noncompliance, i.e., inspection reports, monitoring data, etc. EPA will ensure that the State has had ample opportunity to initiate the appropriate enforcement response prior to its notification action. If the State does not initiate appropriate and timely action, EPA will then send a Notice of Violation (NOV) to the State and the discharger. State response to the NOV will be sent to EPA in writing within 30 days of receipt.

EPA and State compliance staff will coordinate related enforcement activities as necessary to ensure the most efficient and effective State and Federal compliance actions. It is not implied by this agreement that State actions need prior concurrence by EPA, but that a certain level of communication should take place in the course of enforcement actions covered by the MOA, and this agreement.

The State shall submit QNCRs to EPA by August 31, November 30, February 28, and May 31 of each year in accordance with 40 CFR 123.45. Also, the State shall submit by October 5, January 5, April 5, and July 5 of each year a list of all formal enforcement actions taken during the quarter. State formal enforcement actions are defined as notices of violations and orders, civil referrals to the State Attorney General, consent agreements filed in State court, formal administrative agreements, and criminal referrals to appropriate county attorney or the

State Attorney General. The State shall maintain a record of all penalties assessed as well as those collected.

For non judicial actions to be considered formal, they shall be documents which, when applicable:

- a) Identify the specific violation(s) and the basis for the enforcement action;
- b) Require action to expeditiously achieve compliance (with legal authorities or conditions of the permit);
- c) Specify a timetable for return to compliance;
- d) Contain consequences for noncompliance that are independently enforceable without having to prove the original violation; and
- e) Subject the discharger to adverse legal consequences for noncompliance.

III. CIVIL PENALTIES

The State shall request settlement of its legal claim for civil penalties in accordance with its civil penalty guidance policy. The guidance policy considers such factors as the economic benefit of noncompliance, the seriousness of the violations, the number of violations, the environmental harm done, and the recalcitrance of the violator. The policy acknowledges that costs incurred in returning to compliance are not part of the penalty. All penalty assessments on major permitted dischargers shall be documented on a penalty calculation worksheet. If such a settlement offer is not accepted by the violator, the case shall be referred to the Attorney General for enforcement action.

IV. CREATIVE SETTLEMENTS

Pollution prevention and waste minimization may be considered in case settlements. However, such approaches are not to compromise the deterrence value of the case. Environmental audits may be used.

V. STATE CONSENT AGREEMENT AND JUDICIAL REFERRALS

The State shall consult and coordinate with EPA on all major permitted discharger consent and settlement agreement negotiations and judicial referral preparations under the SWDS. Specifically, the State shall provide EPA a draft copy of the consent agreement before signing and the judicial referral before filing for review and comment. These documents shall be submitted to the Chief of the Enforcement Section for review for a minimum of five working days. Included in the transmittal shall be a summary of the violations and the penalty calculations used to determine the proposed penalty.

To ensure that State actions are not unduly delayed by EPA review, the State must assume EPA's concurrence if comments are not received within the specified time frame. Prior to EPA initiating inspections of any facility with which the State is in negotiation, EPA will consult with the State and take into consideration any detrimental effects of the inspection on the negotiations.

VI. EPA ENFORCEMENT ACTIONS

EPA shall consult and coordinate with the State on all direct enforcement actions it considers in the State. EPA will consider Federal enforcement action only when any of the following situations exist:

- the State requests EPA direct enforcement,
- a violation of an EPA administrative order or consent decree occurs,
- a legal precedent under national environmental laws is present,
- when necessary to ensure the viability of a national initiative (example: National Municipal Policy),
- unresolved interstate issues are present,
- the State fails to address all appropriate violations,
- the State fails to initiate a timely and appropriate enforcement action, or
- where the State has obtained a grossly deficient penalty or sanction under the circumstances of the violations.

Any enforcement related public notice, news release or other public announcement from Region VIII which relates to a regulation and/or a discharger for which the State has primary enforcement responsibility or for which EPA has the enforcement lead, shall be provided to and discussed with the State prior to release by Region VIII. In such cases, the State shall be provided with the opportunity to be present at all press conferences or public meetings where Region VIII press releases are to be discussed.

Where EPA is involved in active litigation with a permittee, EPA will provide as much advance notice to the State as possible prior to inspecting the permittee's facility, which notice shall be at least five (5) working days, except under unusual circumstances (e.g., report of an unauthorized activity where immediate inspection is necessary).

Where EPA takes the lead on a case and decides that an administrative penalty will be sought, EPA will consult by telephone with the State concerning its intended course of

action. EPA will provide the State with a draft of the proposed penalty order for review prior to sending it to the discharger. Included in the transmittal shall be summary of the violations and the penalty calculations used to determine the proposed penalty. A minimum of five (5) working days shall be provided for review.

VII. ATTORNEY GENERAL INVOLVEMENT

It will be the responsibility of the Division of Environmental Regulation to keep the State Attorney General informed of planned EPA direct enforcement actions. A line of communication shall be established between EPA and the Division of Environmental Regulation on anticipated EPA enforcement actions.

VIII. MULTI-MEDIA ENFORCEMENT

A. Multi-Media Enforcement Defined

Multi-Media enforcement shall mean one or all of the following:

- multi-media inspections;
- multi-media targeting of enforcement resources to address specific geographic areas, pollutants of concern, industries, companies or facilities with poor compliance histories across programs;
- settlement conditions with multi-media benefits; and
- multi-media cases, i.e. those with multi-media counts.

These approaches can provide opportunities for: 1) greater environmental results, pollution prevention and/or risk reduction, 2) greater deterrence, and/or 3) greater resource efficiencies by using a single case to accomplish broader enforcement and environmental results.

Multi-media enforcement approaches are intended to supplement rather than supplant single program approaches. Priorities must remain the protection of the public health and the environment, whether it is best accomplished through single or multi-media enforcement activities.

The State is strongly encouraged to assist and participate, when and where appropriate, with EPA multi-media enforcement initiatives. EPA will endeavor to build State capacity (i.e. access to the IDEA system, training, consultation) for multi-media enforcement and remove barriers to multi-media enforcement, where appropriate.

B. **Multi-Media Timely and Appropriate Enforcement Response**

Multi-media enforcement will be a factor taken into account in assessing State performance in individual cases as to whether timely and appropriate enforcement response is being pursued. This recognizes that multi-media enforcement may in some cases slow the process of initiating formal enforcement actions, and that the statutes of limitations involved may prohibit such time delay.

When a multi-media enforcement action may take a longer time to develop than if it were pursued as a single-media case, a case-specific schedule, agreed to by both parties, will be used to establish timely and appropriate Multi-media milestones.

IX. **FEDERAL FACILITIES**

Federal facilities will be treated under this agreement in the same manner as non-federal permittees. EPA will be notified of State enforcement action against Federal Facilities. In March of each year, the Federal Facilities Coordinator will send to the State the A-106 list of Federal facility pollution control projects for review and comment regarding necessary water pollution control projects.

X. **PRETREATMENT**

The State shall be responsible for pretreatment actions to the same degree and extent as any other SWDS violation.

XI. **TIMELINESS AND APPROPRIATENESS OF STATE ENFORCEMENT ACTIONS**

The following enforcement response guidelines will be followed:

A. **Timeliness**

1. The State will evaluate instances of non-compliance by major permittees and P.L. 92-500 minor permittees within 30 days of from the identification of a violation, determine the appropriate response, and document any action taken/not taken (including the technical reasons).
2. In the case of major permittees, the State is expected to have already initiated measures which may include a formal enforcement action to achieve compliance by the time the permittee appears on the QNCR.
3. Prior to a permittee appearing on the subsequent QNCR for the same violation, the permittee should either be in compliance or the State should have taken formal enforcement action to achieve final compliance.

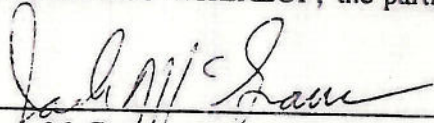
B. Appropriateness

1. Formal enforcement action should be the response to significant noncompliance listed on the QNCR.
2. A judicial referral should be considered where:
 - a. An administrative order has been violated,
 - b. The violation must be stopped immediately,
 - c. Long term compliance must be compelled,
 - d. A substantial economic benefit has been obtained from the noncompliance, or
 - e. A deterrent is needed to prevent others from similarly violating the law.
3. A monetary penalty should be part of each judicial referral or consent agreement.
4. The amount of the penalty to be obtained will be reviewed by EPA countermeasures with one calculated by using EPA's Clean Water Act Civil Penalty Policy. Should EPA determine that any State penalty settlement is grossly deficient, EPA will consult with the State prior to initiating any EPA penalty recovery action and provide to the State a full disclosure of criteria utilized in making such determination.

XII. MODIFICATION

This enforcement agreement shall take effect immediately upon signature by both parties. This agreement or future modified versions of it shall remain in effect as a portion of the NPDES Memorandum of Agreement (Section V.B. of the MOA). Either Party may initiate action to modify the agreement at any time. Proposed amendments or revisions will be submitted in writing to the other party by the signatory to this agreement. Formal response to the proposed modifications will be made within 30 days. If agreement on the revisions cannot be reached within a reasonable time, the agreement can be unilaterally terminated.

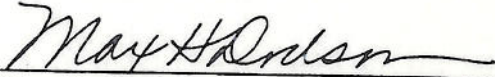
IN WITNESS WHEREOF, the parties have executed this Agreement.



Jack McGraw
Acting Regional Administrator
EPA, Region VIII



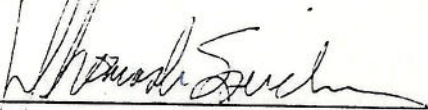
Robert E. Roberts, Secretary
South Dakota Department of Environment
and Natural Resources



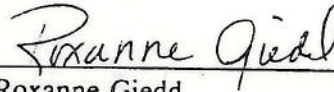
Max H. Dodson, Director
Water Management Division
Region VIII



Steven M. Pirner, Director
Division of Environmental Regulation



Thomas Speicher
Regional Counsel



Roxanne Giedd
Assistant Attorney General

12/30/93

Dated

3/31/93

Dated



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

OCT 22 2001

8P-W-P

Honorable William J. Janklow
Governor, State of South Dakota
Executive Office, State Capitol Building
500 East Capitol
Pierre, South Dakota 57501-5070

Dear Governor Janklow:

I am pleased to inform you that the United States Environmental Protection Agency (EPA) has approved the State of South Dakota's request to modify the South Dakota Pollutant Discharge Elimination System Program to include administration of the sludge management program, pursuant to Sections 402 and 405 of the Clean Water Act, 33 U.S.C. Sections 1342 and 1345, and 40 CFR Parts 123 and 501.

My staff has reviewed South Dakota's request for completeness and adequacy and has found that it meets the requirements for the EPA's approval of state sludge management programs. My staff also has discussed the application with the South Dakota Office of the U.S. Fish and Wildlife Service (FWS). On June 29, 2000, the FWS concurred with the EPA's conclusion that EPA's decision to approve South Dakota's sludge management program was not likely either to jeopardize the continued existence of any species listed as endangered or threatened under the federal Endangered Species Act or to result in the destruction or adverse modification of any designated critical habitat of these species. Additionally, South Dakota's State Historic Preservation Officer has determined that no historic properties would be affected by the EPA's approval of the State's sludge management program.

The EPA has published announcements of its intention to approve South Dakota's proposed sludge management program in the Federal Register and in two of South Dakota's newspapers. The EPA has also mailed notices to persons who may be interested in this action. In these announcements and notices, the EPA requested comments from the public regarding the proposed program approval. No comments were received. The EPA will soon publish a notice in the Federal Register announcing its final approval of this program.



I have signed the Addendum to the Memorandum of Agreement between the U.S. Environmental Protection Agency and the State of South Dakota. Please note that this Addendum supplements and does not replace the Memorandum of Agreement relating to the underlying National Pollutant Discharge Elimination System, which was signed on behalf of South Dakota in 1993.

I look forward to South Dakota's effective implementation of the sludge management program. Please accept my congratulations.

Sincerely,



Jack W. McGraw

js Acting Regional Administrator

cc: Steven Pirner, Secretary, DENR

**ADDENDUM
TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
TO INCORPORATE AGREEMENT CONCERNING SLUDGE USE AND DISPOSAL**

This agreement is an Addendum to a Memorandum of Agreement between the State of South Dakota (State) and the Regional Administrator for Region VIII of the U.S. Environmental Protection Agency (EPA) which was signed by Governor Walter D. Miller on August 30, 1993. The purpose of this Addendum is to define the responsibilities of EPA and the State for establishing, implementing, and enforcing the State's Sludge Management Program in accordance with regulations promulgated under sections 402 and 405 of the Clean Water Act, 33 U.S.C. Sections 1342 and 1345, and as described in the State's Program Description submitted to EPA on August 12, 1998.

Section I. General

1. Nothing in this Addendum should be interpreted to restrict EPA's oversight responsibility or authority for all aspects of the State's Sludge Management Program.
2. This Addendum shall become effective when approved by the both the State and the EPA.
3. Nothing in this Addendum shall limit or relieve the parties of responsibilities established by the MOA to which this is an addendum.
4. The State and EPA will negotiate priorities for implementation of a Sludge Management Program and inspection of POTWs and other sludge users and disposers.
5. The State's noncompliance with any of the terms in this Addendum is grounds for withdrawal of EPA approval of the State's Sludge Management Program.

6. This Addendum pertains to all permit and other regulatory actions relating to sewage sludge use and disposal in the State, other than those occurring in Indian Country, as that term is defined in 18 U.S.C. Section 1151.

Section II. Transfer of Permit Administration

1. Within 30 days of the effective date of this Addendum, EPA will provide the State with all (a) pending permit applications relating to sewage sludge use or disposal on which EPA has not taken final action, and (b) other information relevant to these applications and to program operations in general, including support files, monitoring reports, compliance reports and previously issued permits.
2. EPA-issued sludge permits currently in effect shall remain in effect after EPA's approval of the State's Sludge Management Program.
3. If a sludge user or disposer is required to obtain a permit from both EPA and the State under different programs, the State and EPA may consolidate processing of permits under written procedures that ensure adequate notice to all affected permittees. The State and EPA may coordinate the expiration dates of new and existing permits so that processing of renewal applications may be consolidated.

Section III. EPA Review and Waiver

1. The State will forward to EPA for review, comment, and objection copies of the following:

- permit applications, draft permits, and Statements of Basis for all Class I facilities (*i.e.*, facilities required to have an approved pretreatment program), all facilities where sludge use or disposal practices may affect another state, and all facilities where toxic pollutants in sludge use and disposal practices may affect public health and the environment facilities, and.

- draft general permits for sewage sludge use or disposal.

EPA shall make comments, objections, or recommendations on draft individual permits during the public comment period. EPA reserves the right to take 90 days to supply specific grounds for objections as provided under 40 CFR Section 123.44. In the case of general permits, EPA shall have 90 days to make comments, objections or recommendations.

2. For all other sludge permit applications, EPA waives review, unless EPA notifies the State otherwise in writing.

Section IV. Reporting

1. Within thirty days of any action that the State takes related to any permit application or to any general permit, the State will notify EPA in writing of that action. This requirement does not apply to any permit for which EPA has waived review.
2. The State will provide EPA with a copy of every permit issued to a Class I sludge management facility. Copies of other final permits issued to other treatment works treating domestic sewage shall be transmitted to the EPA upon EPA's request.
3. The State will address biosolids facility inspections in the annual State/EPA inspection plan in accordance with the schedule outlined in the EPA/State Performance Partnership Agreement.
4. By April 1st of each year the State will review all biosolids annual reports and electronically provide summary data to EPA through the Biosolids Data Management System (BDMS).
5. The State shall provide EPA with annual reports as required by 40 CFR §501.21.

Section V. Enforcement and Compliance Monitoring

The enforcement and compliance monitoring provisions in the MOA shall apply to treatment works treating domestic sewage, to sludge users and disposers, and to sludge use and disposal practices.

Section VI. Program Review

The program review section of the MOA shall apply to the State's sludge management program.

Section VII. Permitting

1. All permits that the State issues for sewage sludge use or disposal will include all permit conditions required by 40 CFR §501.15(b).
2. The State will require all applicants for sewage sludge use or disposal permits to provide all information that 40 CFR §501.15 requires to be included in permit applications.
3. The State will accept signatures of permit applicants as provided by 40 CFR §501.15(b).

4. Because the State considers effluent data to include sewage sludge data the State will not keep sewage sludge data confidential.
5. The State will modify, revoke and reissue, and terminate permits only following written requests to do so and only for those reasons specified in 40 CFR §501.15(c).
6. All draft permits prepared by the State will contain all conditions required by 40 CFR §501.15(d)(3).
7. Upon issuing a final permit, the State will issue a response to comments, which will be available to the public, specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the change, briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any meeting or hearing.

Section VIII. Modification

Either the State or the EPA may initiate action to modify this MOA at any time. If the EPA determines that any modification to the MOA initiated by the State does not conform to the requirements of section 402(b) or 405 of the CWA, the requirements of 40 CFR Parts 122-125 and 501, or any other applicable Federal regulations, as amended, the EPA shall notify the Secretary in writing of any proposed revision or modifications which must be in this agreement. Any proposed amendments or revisions must be made by a written agreement between the Secretary and the EPA Regional Administrator.

Section IX. Incorporation by Reference

The State may adopt any Federal standards or requirements by reference. Unless permissible under State law, the State will not prospectively incorporate regulations by reference.

Section X. Notifications

1. All notifications that the State is to provide EPA under this addendum shall be sent in writing to the following:

Assistant Regional Administrator
Office of Partnerships and Regulatory Assistance
U.S. EPA, Region VIII
999 18th Street, Suite 500
Denver, CO 80202-2466


2. All notifications that the EPA is to provide the State under this addendum shall be sent in writing to the following:

Secretary
Department of Environment and Natural Resources
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181

Section X. Effective Date

This Addendum shall become effective upon signature by both parties. If the parties sign on different dates, the later date shall be the effective date.


FOR THE STATE OF SOUTH DAKOTA:



Steven M. Pirner, Secretary
Department of Environment
and Natural Resources
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181

9/27/01
Date

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY



Jack W. McGraw
Acting Regional Administrator
EPA Region VIII
999 18th Street, Suite 300
Denver, CO 80202

10/22/01
Date