

**Petition in Opposition to George Ferebee's Petition for Declaratory
Ruling on ARSD 74:53:01:04**

1. Petitioner: Pennington County Board of Commissioners
2. Petitioner's interest in Ferebee's petition for declaratory ruling: Petitioner is the governing body of a county that would be affected by the declaratory ruling that Ferebee is requesting.
3. Petitioner's reasons for opposing Ferebee's petition for declaratory ruling: Petitioner opposes Ferebee's petition for multiple reasons.
 - a. First, ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" Ferebee has not submitted a factual situation. Rather, he is requesting a blanket ruling declaring that "local governments (cities and counties) are bound by ARSD 74:53:01:04." Therefore, without a submitted factual situation, no declaratory ruling can be made.
 - b. Second, in Title 7 that contains many of the powers of counties, the South Dakota Legislature specifically gave counties the statutory authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances. These powers are not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:04 in no way prohibits localities from passing ordinances regulating on-site wastewater systems above and beyond their regulation by the State in the administrative rule. Subsections 14 and 15 of SDCL 7-8-20 provide county commissioners with the power to regulate waste in water and the cleansing or abatement of such.

SDCL 7-8-20 provides in relevant part: In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Furthermore, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding, breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.

Simply put, a nuisance is an act or omission which "endangers the comfort, repose, health, or safety of others." SDCL 21-10-1. It is clear that an on-site wastewater system of any age may be in danger of contaminating water and endangering the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state constitutes a public nuisance and may be abated as such. A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

- c. Third, on April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems to protect drinking water resources and to promote clean water resources and protect public health and the environment.
 - d. Finally, this appears to be a collateral attack by Ferebee against local regulation of onsite wastewater treatment systems regarding Ferebee's Pennington County Zoning Ordinance violation that is currently being litigated.
4. Mailing address: Pennington County Board of Commissioners, 130 Kansas City Street, Rapid City, SD 57701
 5. Petitioner's legal counsel: Jay Alderman, Chief Civil Deputy State's Attorney; Kinsley Groote, Civil Deputy State's Attorney; Michael Hofmann, Civil Deputy State's Attorney
 6. The Pennington County Board of Commissioners requests a continuance of the hearing (from the July 6, 2016 meeting presumably to the October 5, 2016 meeting).
 7. ---Copy of Motion made by Pennington County Board of Commissioners on 6/21/16---
PETITIONS FOR DECLARATORY RULINGS – SD DENR WATER MANAGEMENT BOARD: MOVED by Buskerud and seconded by Trautman to direct the States Attorney's Office to file a petition in opposition to the two Declaratory Ruling Petitions regarding Administrative Rule. It was further moved to authorize the Chairman's signature and request an automatic continuance. The motion carried 4-0 on a roll call vote: Buskerud – yes, Ferebee – abstained, Hadcock – yes, Trautman – yes, Petersen – yes.

Signature: Lyndell Petersen
Lyndell Petersen, Pennington County Board of Commissioners Chairman

Date: 6/21/2016

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NICHOLE J. MOHNING %
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Also licensed to practice
in Iowa
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in Nebraska
% Also licensed to practice
in Kansas
° Also licensed as a Certified
Public Accountant (Inactive)

June 24, 2016

Via FedEx

Water Rights Program
Attn: Chief Engineer
Foss Building
523 E. Capitol
Pierre, SD 57501

Via FedEx

Mr. George W. Ferebee
11495 Gillette Prairie Road
Hill City, SD 57745

Re: Petitions in Opposition of (i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18

Dear Chief Engineer Goodman and Mr. Ferebee:

Please be advised that our firm represents the South Dakota Association of County Commissioners ("SDACC") and the South Dakota Municipal League ("SDML"). Enclosed please find petitions from the SDACC and SDML in opposition to: i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 (collectively the "Ferebee Petitions"). Please accept this letter, and the enclosed petitions, as notice by the SDACC and SDML of their opposition to the Ferebee Petitions and as a request that such hearing currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Should you have any questions regarding this petition or the request for delay, please do not hesitate to contact me at (605) 271-4938, at the address above, or via email at erice@cutlerlawfirm.com.

Sincerely,

CUTLER LAW FIRM, LLP



Eric E. Erickson
For the Firm

EEE/nmw
Enclosures
cc: SDACC, SDML

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE
RULE OF SOUTH DAKOTA 74:53:01:04**

1. **PETITIONER:** South Dakota Municipal League ("SDML").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDML was organized in 1934 as a non-partisan, non-profit association of incorporated municipalities in South Dakota. Many of the SDML's member-municipalities, including without limitation Rapid City, have enacted ordinances that regulate the operation of on-site wastewater systems, including on-site wastewater systems constructed prior to February 28, 1975. This matter is of the utmost interest to the SDML as the authority of its member-municipalities to regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04:**

The SDML opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides municipalities with broad authority to regulate activities such as on-site wastewater systems. In addition to other authority provided in state law, SDCL §§ 9-32-6 and 9-32-8 provide municipalities with the authority to regulate activities such as the operation of on-site wastewater systems and do not limit such authority to only those on-site wastewater systems constructed after February 28, 1975. In particular, SDCL § 9-32-8 provides, "Every municipality shall have power to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality." Additionally, SDCL § 9-32-6 provides, "Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:04. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04.

4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

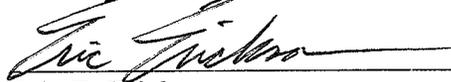
Cutler Law Firm, LLP
Attn: Eric E. Erickson
P.O. Box 1400
Sioux Falls, SD 57101-1400
Phone: (605) 271-4938
Email: erice@cutlerlawfirm.com

5. **REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23rd of June, 2016.

CUTLER LAW FIRM, LLP
Attorneys at Law



Eric E. Erickson
100 N. Phillips Ave., 9th Floor
P.O. Box 1400
Sioux Falls, South Dakota 57101-1400
Telephone (605) 335-4950
Facsimile (605) 335-4961
Attorney for Petitioner

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE
RULE OF SOUTH DAKOTA 74:53:01:04**

1. **PETITIONER:** South Dakota Association of County Commissioners ("SDACC").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDACC is an association authorized by state law that represents all of South Dakota's sixty-six (66) counties. The SDACC has a stated purpose of "securing concerted action among the counties in behalf of such matters, measures and county affairs as the associations deem to be beneficial to and in the common interest of the counties." SDCL § 7-7-28. Many of the SDACC's member-counties, including without limitation Pennington County, have enacted ordinances that regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975. This matter is of the utmost interest to the SDACC as the authority of its member-counties to regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04:**

The SDACC opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04 for multiple reasons, including, but not limited to:

State law provides counties with broad authority to regulate activities such as on-site wastewater systems. In addition to other authority provided in state law, SDCL §§ 7-8-20 and 7-8-33 provide counties with the authority to regulate activities such as the operation of on-site wastewater systems and do not limit such authority to only those systems constructed after February 28, 1975. In particular, SDCL § 7-8-33 provides, in part, "The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality...." In addition, SDCL § 7-8-20 provides, in relevant part, the county commissioners with the power to:

- (14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place;

The authority of counties to regulate such activities is not precluded by state law nor ARSD 74:53:01:04. For the foregoing reasons, and additional authority as may later be supplemented, the SDACC gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04.

4. MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDACC:

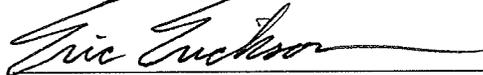
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Phone: (605) 271-4938
Email: erice@cutlerlawfirm.com

5. REQUEST FOR A DELAY OF HEARING:

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23rd of June, 2016.

CUTLER LAW FIRM, LLP
Attorneys at Law



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Attorney for Petitioner



CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

RECEIVED

JUN 27 2016

WATER RIGHTS
PROGRAM

Office of the City Attorney

300 Sixth Street

Rapid City, South Dakota 57701-2724

Telephone: 605-394-4140

FAX: 605-394-6633

E-mail: attorney@rcgov.org

www.rcgov.org/attorney/attorneyhomepage.htm

June 24, 2016

Ms. Jeanne Goodman, Chief Engineer
Water Rights Program
523 E. Capitol
Pierre, SD 57501

RE: City of Rapid City Petitions in Opposition
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18

Dear Ms. Goodman

Enclosed for filing in the above matters is the City of Rapid City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04 and the City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18. As is noted in the Petitions, the City is requesting the Water Management Board delay the matter at least 20 days in order for the City to more fully respond.

Thank you for your assistance.

Sincerely,

Wade Nyberg, Assistant City Attorney

cc: Mr. George Ferebee
Mr. Jay Alderman

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION
FOR DECLARATORY RULING ON ARSD 74:53:01:04**

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04 as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
3. Petitioner opposes Mr. Ferebee's petition for declaratory ruling for the following reasons:
 - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to

legislate in this area; this subject matter is clearly beyond the scope of the Board's authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:04 preempts local legislative enactments regarding certain on-site wastewater systems. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority "to protect public groundwater supplies from pollution" (SDCL 9-12-17); "to do what may be necessary or expedient for the promotion of health or the suppression of disease" (SDCL 9-32-1); "to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof" (SDCL 9-32-6); "to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality" (SDCL 9-32-8); and "to declare what shall constitute a nuisance and prevent, abate, and remove the same" (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency's administrative rules. These direct grants of authority contradict Mr. Ferebee's assertion that municipalities are prohibited from legislating in this area.

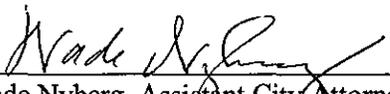
Furthermore, it is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota

court has declared a municipality's regulation of such invalid due to state preemption. Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

4. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
5. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
6. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

CITY OF RAPID CITY



Wade Nyberg, Assistant City Attorney

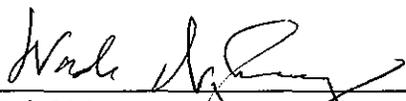
CERTIFICATE OF SERVICE

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:04 by US Mail, postage prepaid, to the following :

Chief Engineer
Water Rights Program
Foss Building
523 E Capitol
Pierre, SD 57501

Mr. George Ferebee
11495 Gillette Prairie Rd
Hill City, SD 57545

Mr. Jay Alderman
Pennington County States Attorney
130 Kansas City Street, Ste. 300
Rapid City, SD 57701-2818



Wade Nyberg