

**Petition in Opposition to George Ferebee's Petition for Declaratory  
Ruling on ARSD 74:53:01:18**

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 "Administrative Rule of South Dakota 74:53:01:18 is the exclusive province of the State of South Dakota" and that "local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975." 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 74:53:01:18 in no way prohibits localities from passing ordinances regulating cesspools and pit privies 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 matters closely related to on-site wastewater systems. Ferebee is currently charged with a violation of Pennington County Zoning Ordinance sections pertaining to on-site wastewater treatment systems.
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

RICHARD A. CUTLER  
KENT R. CUTLER  
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KIMBERLY R. WASSINK  
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NICHOLE J. MOHNING %  
DANIEL J. DOYLE  
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ROBERT D. TRZYNSKA  
ERIC E. ERICKSON  
JOSEPH P. HOGUE °  
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JEAN BROCKMUELLER, CPA (Inactive)  
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in Minnesota  
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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](mailto: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 74:53:01:18**

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 cesspools and pit privies, including cesspools and pit privies 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 cesspools and pit privies, 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 74:53:01:18:**

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 cesspools and pit privies. 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 cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, 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." Additionally, 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."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:18. 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 74:53:01:18.

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

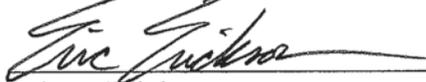
Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

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 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



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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 74:53:01:18**

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 cesspools and pit privies, including cesspools and pit privies constructed 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 cesspools and pit privies, 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 74:53:01:18:**

The SDACC 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 counties with broad authority to regulate activities such as cesspools and pit privies. 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 cesspools and pit privies and do not limit such authority to only those cesspools and pit privies 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..." Additionally, 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 or ARSD 74:53:01:18. 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 74:53:01:18.

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

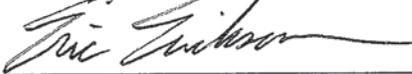
Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
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Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

**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 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



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Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
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Telephone (605) 335-4950  
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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](mailto:attorney@rcgov.org)  
[www.rcgov.org/attorney/attorneyhomepage.htm](http://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

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**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:18**

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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 74:53:01:18 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.
  - 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 74:53:01:18 preempts local legislative enactments regarding cesspools or pit privies. 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.

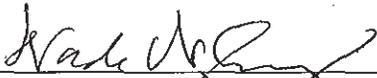
It is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota court has declared a municipality’s regulation of such invalid due 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.

3. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
4. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
5. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 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

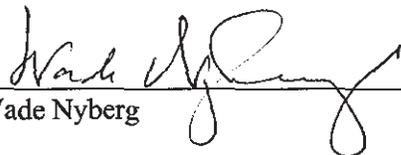
**CERTIFICATE OF SERVICE**

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 74:53:10:18 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