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APR 4 - 2016

Dept. of Environment and
Natural Resources
Secretary's Office

11495 Gillette Prairie Rd
Hill City, SD 57745
March 31, 2016

SD DENR
Joe Foss Building
523 E. Capitol
Pierre, SD 57501

Dear Secretary Pirner:

I write to suggest a dialogue regarding "declaratory rulings" as applied by your "agency" (Department). Even though the law (SDCL 1-26-15) requiring that each agency have a rule for the filing and prompt disposition of petitions for declaratory rulings has been around for a number of years, I only recently became aware of such a redress mechanism.

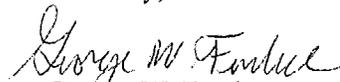
On March 9, 2016, the South Dakota Supreme Court ruled on a petition to the Department of Labor for a declaratory ruling regarding the application of a statute. In its opinion, the Court wrote rather extensively, addressing the applicable statutes and relevant case law. As I read and studied the Court's *opinion*, I came to the realization that the *declaratory ruling* process enacted by our Legislature might just be the appropriate methodology to resolve the nagging controversy regarding the issue(s) of *water quality* as envisioned by Pennington County. *In Re: Petition for Declaratory Ruling*, 2016 S.D. 21

After reading and studying the Court's *opinion*, I made several calls to Pierre, searching for guidance on how to proceed. For example, I was trying to find the *rule* for the filing of a petition with your agency (Department). I talked with Kim Smith and Ron Duvall of your Department. Ron Duvall suggested that before filing a petition, I might want to write a letter to you or Mr. Woodmansee to broach the issue.

Mr. Secretary, there are numerous issues and sub issues and sub sub issues involving *water quality* and Pennington County, however, I believe that resolution of one critical issue will serve to moot many other issues. The critical issue is, as set forth by the South Dakota Supreme Court: "And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation." *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. My specific inquiry to the South Dakota Department of Environment and Natural Resources involves chapter 74:53:01 of your Administrative Rules.

~~For full disclosure, my efforts in this matter are for both me and the many constituents of my county commission district. Recognizing that your agency has a multitude of *rules* which may have differing implementation arrangements. our initial inquiry is limited to: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?~~

Sincerely,


George W. Ferebee



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

May 3, 2016

George Ferebee
11495 Gillette Prairie Road
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your letter regarding the Department of Environment and Natural Resources' implementation of Administrative Rules Chapter 74:53:01. You ask in your letter whether it is the department's intent to exclusively occupy the field circumscribed by this chapter.

South Dakota Codified Law (SDCL) § 34A-2-93 gives the Water Management Board the authority to promulgate rules to establish the design and installation requirements for on-site wastewater systems. The Water Management Board has used this authority to adopt Chapter 74:53:01, Individual and Small On-site Wastewater Systems. This chapter sets out the minimum design and installation requirements for on-site systems built throughout the state. You can request an official declaratory ruling from the Water Management Board pursuant to South Dakota Administrative Rule 74:02:01:46.

My informal position as Secretary of the Department, however, is that we do not intend to exclusively occupy this field. We are not aware of any law that would prohibit local governments from adopting its own requirements for the design, construction, or operation of septic systems within its jurisdiction as several have done for many years. While any ordinance adopted by a county may not be less stringent than a state requirement, the legislature has given broad authority to local governments in making land use decisions through their respective planning and zoning ordinances.

Thank you again for your letter.

Sincerely,

Steven M. Pirner, P.E.
Secretary

cc: Ellie Bailey, Assistant Attorney General, Office of Attorney General
Matt Konenkamp, Policy Advisor, Governor's Office

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MAY 4 - 2016

Dept. of Environment and
Natural Resources
Secretary's Office

11495 Gillette Prairie Rd
Hill City, SD 57745
May 2, 2016

SD DENR
Joe Foss Building
523 E. Capitol
Pierre, SD 57501

RE: Declaratory rulings

Dear Secretary Pirner:

This letter is a follow-up to my March 31, 2016, letter to you. It is my understanding that my March 31st letter arrived in Pierre and has been discussed.

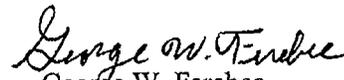
Seems to me that since I narrowed the focus of the initial inquiry to one rather straightforward question, your response should have arrived in Hill City by now. Please recall the initial inquiry was and still is: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Mr. Secretary, if your response to my March 31st letter is in want of more specificity and/or particularity, I will provide a petition for "declaratory ruling," relying on ARSD 74:02:01:46 for guidance. Such petition is attached.

Maybe, just maybe, a petition for a "declaratory ruling," on what seems to be a rather simple, straightforward matter will be a catalyst to cause breakup of whatever logjam might exist in responding to my March 31st. The *petition*: Seasoned outhouses (pit privies) or not is the question.

Once again, Mr. Secretary, my efforts in this matter are for both me and the many constituents of my county commission district. Please be reminded of the South Dakota Supreme Court's words from *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. "And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation."

Sincerely,


George W. Ferebee

cc: South Dakota Attorney General Jackley

Atch: Petition for Declaratory Ruling

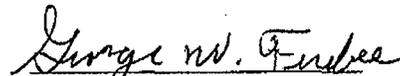
PETITION
FOR
DECLARATORY RULING

(1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46

(2) The name of person submitting the petition: George W. Ferebee

(3) The requested action and reasons for the action: Declare ARSD 74:53:01:18 the

exclusive province of the State of South Dakota. Put another way, declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975. Reason for *Petition*: To eliminate the existing controversy.


GEORGE W. FEREBEE

RECEIVED

MAY 11 2016

Dept. of Environment and
Natural Resources
Secretary's Office

11495 Gillette Prairie Rd
Hill City, SD 57745
May 9, 2016

SD DENR
Joe Foss Building
523 E. Capitol
Pierre, SD 57501

Dear Secretary Pirner:

Thank you so very much for your May 3rd letter. Quite impressive. Thank you for identifying the applicable South Dakota Administrative Rule for requesting a *declaratory ruling*. Also, thanks for providing "your" *position* on *occupying* the field circumscribed by ARSD 74:53:01.

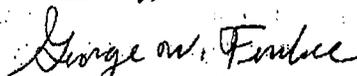
In your letter you point out that the South Dakota Water Management Board promulgated rules regulating "Individual and Small On-Site Wastewater Systems" (ARSD chapter 74:53:01) under authority granted by the South Dakota Legislature in SDCL 34A-2-93. In your next paragraph you state: "We [presumably you and your staff] are not aware of any law that would prohibit local governments from adopting its [sic] own requirements for the design, construction, or operation of septic systems within its [sic] jurisdiction" You continue with a pronouncement (declaration of sorts) regarding ordinance stringency.

First question (request): Are you *aware* of any *law* that *allows* local governments to *adopt* requirements for the design, construction, or *operation* of septic systems within that government's jurisdiction? If so, please provide, with particularity. Second question (request): Will you please share with me, which legislative enactments, if any, and/or promulgated provisions, if any, that give local units of government the authority to regulate "Individual and Small On-Site Wastewater Systems?" My research thus far on both questions, which are essentially the same, has yielded an empty hand. Looking forward to your specificity.

I am looking forward to your information for at least two reasons: (1) I can discontinue my search, and (2) We (the involved government and South Dakota citizens) can move on to other relevant matters. Identifying the appropriate authority(ies), with specificity, just might bring an end to some of the uncertainty and, of course, some of the misperceptions.

Back to "ordinance" *stringency*. For now, I intend to hold on that matter. Seems to me that we should first reconcile our apparent differences regarding regulatory authority as suggested above. In other words, let's nail down the authority for "Individual and Small On-Site Wastewater Systems."

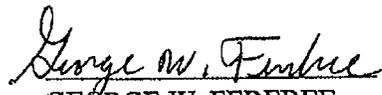
Sincerely,


George W. Ferebee

cc: South Dakota Attorney General Jackley

PETITION
FOR
DECLARATORY RULING

- (1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46
- (2) The name of person submitting the petition: George W. Ferebee
- (3) The requested action and reasons for the action: Declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. Reason for *Petition*: To eliminate the existing controversy.


GEORGE W. FEREBEE
11495 Gillette Prairie Rd
Hill City, SD 57745
(605) 574-2637



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

May 26, 2016

George Ferebee
11495 Gillette Prairie Road
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your May 2, 2016, letter providing DENR with a petition for a declaratory ruling. We also received your May 9, 2016, letter regarding local government's authority to regulate septic systems and a second petition for another declaratory ruling.

In your letters, you asked several questions regarding the authority of local governments. Generally, South Dakota Codified Laws, Title 11, addresses planning and zoning. Other areas of the code may also contain additional statutes regarding zoning.

We are processing your two petitions for a declaratory ruling by the Water Management Board on your two questions. Your first petition is whether local governments have authority to prohibit the operation of pit privies constructed prior to February 28, 1975. Your second petition is to declare local units of government are bound by ARSD 74:53:01:04. We have tentatively scheduled two hearings to allow the Board to consider your two separate declaratory ruling petitions for the July 6 – 7 meeting in Pierre.

My staff is drafting the required public notices for your two separate petitions as required by administrative rule 74:02:01:48. To ensure your petitions may be heard at the July board meeting, the notices must appear in the required newspapers by mid-June to meet the necessary timelines established in law. Since your declaratory ruling petitions have ramifications beyond Pennington County, the public notice will need to be published in at least three daily newspapers located in Aberdeen, Rapid City, and Sioux Falls to give others throughout South Dakota the opportunity to be part of the hearing. Also, since your petitions are separate issues, we have determined a notice is required for each petition.

Administrative rule 74:02:01:48 requires the petitioner to publish a notice of hearing describing the contents of the petition. Therefore, while DENR staff will draft the public notices for your two petitions to meet all state requirements for the notices, you will be responsible for the cost of all publications. In early June, my staff will provide you with the notices with instructions on which newspapers to contact to authorize publication and arrange for payment. If the notices are not adequately published, the hearings cannot be held.

If you have any questions about the board hearing in July, please contact Eric Gronlund at (605)773-3352.

Thank you again for your letters.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven M. Pirner". The signature is stylized with a large initial "S" and a long horizontal stroke at the end.

Steven M. Pirner, P.E.
Secretary

cc: Ellie Bailey, Office of Attorney General
Matt Konenkamp, Governor's Office