

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

IN RE HEARING FOR REISSUING)	
THE GENERAL WATER POLLUTION)	
CONTROL PERMIT FOR)	MOTION TO SUSPEND
CONCENTRATED ANIMAL)	PROCEEDINGS
FEEDING OPERATIONS)	
)	

COMES NOW the Intervenor Dakota Rural Action (“DRA”), by and through its attorney of record, Kelsea K. Sutton, and moves to suspend the proceedings of the contested case hearing for the General Water Pollution Control Permit for Concentrated Animal Feeding Operations, scheduled for September 27-29, 2016, for the following reasons:

1. The Feedlot Permit Program has failed to meet its public notice requirements under the Clean Water Act and South Dakota law.
2. The facts and analysis of the Feedlot Permit Program’s failure in its public notice and participation duties is outlined in the attached **Brief in Support of Motion to Suspend**.

WHEREFORE, Intervenor Dakota Rural Action respectfully requests the Hearing Examiner enter an Order that:

1. Suspends all pending proceedings;
2. Requires the Feedlot Permit Program to properly notice and accept comments on the August 12, 2016, Proposed Permit; and
3. Requires the Feedlot Permit Program to produce a comprehensive redline version of the existing expired general permit that shows all of the incorporated changes.

Dated this 26th day of September 2016.

JOHNSON POCHOP & BARTLING

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of September 2016, she served a copy of this **Motion to Suspend Proceedings** by email upon the following parties of record:

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STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

IN RE HEARING FOR REISSUING)	
THE GENERAL WATER POLLUTION)	
CONTROL PERMIT FOR)	BRIEF IN SUPPORT OF
CONCENTRATED ANIMAL)	MOTION TO SUSPEND
FEEDING OPERATIONS)	
)	

COMES NOW the Intervenor Dakota Rural Action (“DRA”), by and through its attorney of record, Kelsea K. Sutton, and respectfully asks the Hearing Examiner to suspend the proceedings of the contested case hearing for the General Water Pollution Control Permit for Concentrated Animal Feeding Operations (“General Water Permit”), scheduled for September 27-29, 2016 for the following reasons:

I. FACTS

This contested case has been scheduled regarding the renewal of South Dakota’s existing expired General Water Permit with major modifications. The Feedlot Permit Program (“FPP”) has done something unique in the case of this General Water Permit in that it has combined both the federal National Pollutant Discharge Elimination System (“NPDES”) permit and the state “designed not to discharge” permit into one general permit document. Thus, the FPP for the purposes of this general permit is required to adhere to both the federal public notice regulations and the state statutory public notice requirements.

On September 4, 2015, the Department of Environment and Natural Resources Feedlot Permit Program (“FPP”) mailed a letter to interested parties, which contained information on how to obtain the 09/02/15 “preliminary draft” of the Proposed General Water Pollution Control

Permit for Concentrated Animal Feeding Operations (“Proposed Permit”).¹ The FPP then conducted an informational webinar on September 17, 2015, using the 09/02/15 version of the Proposed Permit.² This letter, webinar, and draft were a part of the “informal comment period,” which lasted until September 28, 2015.³

The FPP responded to preliminary comments on October 8, 2015.⁴ The FPP also Published Notice of their Recommended Proposed Permit on October 8, 2015; the Recommended Proposed Permit carried the same date—“10/08/15”—in the upper right hand corner of the document.⁵ The FPP’s Notice of the Proposed Permit on October 8th commenced the formal, 30-day public comment period, which ended on November 8, 2015.⁶ The FPP compiled a response to the public comments from the October 8th to November 8th public notice and comment period on an unknown date, a draft of which is included in their Exhibit 1, Administrative Record.⁷

The Proposed Permit that was—and currently is—published on the DENR’s Public Notice and Contested Case webpages is the 10/08/15 version.⁸ The FPP sent notice of the contested case hearing to eleven (11) intervening parties on August 2, 2016.⁹ The FPP published

¹ See FPP Exhibit 1, Administrative Record, 103.

² See *id.* at 1.

³ See *id.* at 1, 103.

⁴ See *id.* at 1.

⁵ See *id.* at 2, 191-282.

⁶ See *id.* at 2.

⁷ See *id.* at 395-427.

⁸ See Notice for General Water Pollution Control Permit for Concentrated Animal Feedings Operations Draft Permit Link, *available at* <http://denr.sd.gov/public/default.aspx>; DENR Secretary’s Office Proceedings for General Water Pollution Control Permit for Concentrated Animal Feeding Operations Draft Permit Link, *available at* <http://denr.sd.gov/contested.aspx>.

⁹ See FPP Exhibit 1, Administrative Record, 3.

notice of the contested case hearing in ten (10) South Dakota newspapers on August 16 and 17, 2016.¹⁰ The FPP submitted its exhibits for the contested case hearing on August 26, 2016.¹¹

The Proposed Permit submitted as Exhibit 6 on August 26, 2016, contains two dates in the upper right hand corner that display as the following: “DRAFT: ~~0108~~/~~07~~12/16.”¹² This Exhibit 6, by virtue of its redline revisions, references January 7th and August 12th versions of the Proposed Permit. The January 7th version has never been provided to Intervenor Dakota Rural Action, nor is there any evidence that it has been provided to the other Intervening Parties or general public for the opportunity to review and comment.

The August 12th redline version was prepared ten (10) days after notice of the contested case hearing was mailed to the Intervening Parties on August 2, 2016. The August 12th redline version presented to the parties as “Exhibit 6” on August 26, 2016, was not explained as a revision draft in the FPP’s discovery disclosures. The August 12th version has never been provided to the general public for the opportunity to review and comment.

No redlined copies of, or explanations of changes to, the October 8, 2015, Proposed Permit have been provided to Intervenor Dakota Rural Action. Dakota Rural Action has also never received a comprehensive, redlined version of the existing expired general permit that shows all of the incorporated changes. Similarly, the public has never received notice of a comprehensive, redlined version that would explain where language from the existing permit was removed, added, and/or revised so that the public could be fully informed.

¹⁰ *See id.* at 3.

¹¹ *See* FPP’s Certificate of Service dated August 26, 2016.

¹² *See* FFP Exhibit 6, DRAFT Proposed Changes to General Permit.

II. ANALYSIS

A. Under the Clean Water Act, South Dakota’s NPDES permit program administrator is required to give notice, opportunity for public comment, and opportunity to participate in a public hearing prior to the issuance of a permit.

The purpose of the Federal Water Pollution Control Act (“Clean Water Act”) is to reduce and eliminate water pollution.¹³ Congress intended to guarantee the public a meaningful role in the implementation of the Clean Water Act, as 33 U.S.C. 1251(e) mandates that “public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation plan, or problem established by . . . any State under this Act shall be provided for, encouraged and assisted by the . . . States.”¹⁴ The states have the delegated authority to issue general permits under state-sponsored NPDES programs, but they must administer them in line with the requirements of the federal code: “General permits may be issued, modified, revoked and reissued, or terminated in accordance with applicable requirements of part 124 of this chapter or corresponding State regulations.”¹⁵ Further, part 123.25 explains the requirements for permitting: “All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each . . . (28) § 124.10 . . . (public notice) . . . (29) ¶ 124.11 – (public comments and requests for hearings) . . .”¹⁶

¹³ 33 U.S.C. § 1251(a)(1).

¹⁴ See also 2003 Final CAFO Rule, 68 F.R. 7176-7274.

The public has an important role in the entire implementation of the NPDES Program, including the implementation of the NPDES permitting of CAFOs. The NPDES regulations in 40 CFR parts 122, 123, and 124 establish public participation in EPA and State permit issuance, in enforcement, and in the approval and modification of State NPDES Programs.

Id. at 7233.

¹⁵ 40 C.F.R. § 122.28.

¹⁶ 40 C.F.R. § 123.25.

Thus, the federal code binds the states to follow appropriate procedures for public participation in the issuance of general permits. Specifically, 40 C.F.R. § 123.25 binds the states to comply with public notice requirements under § 124.10 *et seq.* Section 124.10(b)(1)-(2) requires the Director to give at least 30 days public notice for a comment period and at least a 30-day notice before holding a public hearing. The 2003 Final CAFO Rule expands upon the requirements in § 124.10: “Under these existing regulations, the public may submit comments on *draft individual and general* permits and may request a public hearing on such a permit.”¹⁷

The FPP acknowledged these requirements in its October 8th Response to Preliminary Comments.¹⁸ In response to Comment 57, the FPP states: “Under the EPA’s 2012 regulations, EPA has set public notice and contested case hearing requirements that . . . apply to NPDES permits for concentrated animal feeding operations.”¹⁹ The public has not been given the opportunity to comment on or intervene in a contested case hearing for the FPP’s January 7th or August 12th Proposed NPDES Permits.

Because the state “designed not to discharge” permits are also delegated and administered according to the EPA’s duties under the Clean Water Act, the same public notice and participation requirements apply to the state permit portion of the Proposed Permit as do the NPDES portions.

¹⁷ 2003 Final CAFO Rule, 68 F.R. at 7233 (emphasis added).

¹⁸ The October 8th Response begins on page 153 of the FPP’s Exhibit 1, Administrative Record.

¹⁹ *Id.* at 168-69.

B. SDCL §§ 34A-1-112 and 34A-1-113 require the DENR to provide public notice and the opportunity for a public hearing on general permits.

State statutes also require the Department of Environment and Natural Resources to issue public notice and the opportunity for a contested case hearing prior to the issuance of a general permit for a category of water pollution.²⁰ SDCL § 34A-1-112 provides:

After public notice in at least three newspapers of general circulation in this state and notice to all municipalities, counties, and tribal governments and opportunity for public hearing, the secretary may issue a general permit If an affected facility or interested party wishes to contest the order, a request for hearing shall be filed with the department within twenty days. . . . Notice of the hearing shall be published in at least three newspapers of general circulation in this state.

The updating of the expired general permit constitutes a modification of the general permit subject to the above provisions. The public has not been given the opportunity to comment on or intervene in a contested case hearing for the Feedlot Permit Program's January 7th or August 12th versions.

C. Even if the Department has complied with its public notice duties, the Intervening Parties do not have the ability to fully prepare their cases because they do not know which version of the permit they should rely upon.

This proceeding is a continuance of the original contested case hearing date scheduled for December 16, 2015, that was a contestation of the October 8, 2015, proposed permit. Dakota Rural Action's case was built around what it believed to be the final permit recommendation made on October 8, 2015. Its expert has prepared by relying upon the draft of the proposed permit dated October 8, 2015. This is the same October 8, 2015, proposed permit that any member of the general public seeking to participate in the hearing would use according to the "Draft Permit" posted on DENR's website.

²⁰ SDCL §§ 34A-1-112 and -113.

Since October 8th, the FPP has developed at least two new drafts without any explanation of how they are different from the October 8th version. They have submitted no redlined version of the October 8th permit, and they have not provided any sort of explanatory document regarding the different drafts.

Further, they have submitted no comprehensive redline version of the existing expired general permit that shows all of the incorporated changes. It is impossible for the Program and the Intervenors to have a meaningful hearing at this point because the Intervenors cannot fully prepare without being provided a comprehensive version showing all the changes.

III. CONCLUSION

The Department of Environment and Natural Resources Feedlot Permit Program has not met its legal duty to provide public notice and the opportunity for public participation in this case. There are at least two additional versions of the proposed general permit—beyond the October 8, 2015, version—that the public has not been given the opportunity to review, comment on and voice their concerns about at a public hearing. For all of the foregoing reasons, the Honorable Hearing Examiner should suspend all proceedings subject to the Program’s production of a comprehensive redline version of the existing expired general permit that shows all of the incorporated changes and the Program’s proper execution of public notice for the General Water Pollution Control Permit for Concentrated Animal Feeding Operations.

Dated this 26th day of September 2016.

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Permit No.: DRAFT 10/08/15

Note: This page will be replaced with a copy containing the assigned permit number and indicating whether the permit is a state or federally enforceable National Pollutant Discharge Elimination System permit once coverage is authorized.

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(Facility Name)

**GENERAL WATER POLLUTION CONTROL PERMIT FOR
CONCENTRATED ANIMAL FEEDING OPERATIONS**

In compliance with the provisions of the South Dakota Water Pollution Control Act and the Administrative Rules of South Dakota, chapters 74:52:01 through 74:52:11, the South Dakota Department of Environment and Natural Resources (DENR) directs Concentrated Animal Feeding Operations to have no discharge from their production areas or manure management systems to waters of the state except for discharges that meet the conditions of this permit.

This permit shall become effective, DATE.

This permit and the authorization to discharge shall expire at midnight, DATE.

Signed this DAY of MONTH, YEAR.

Authorized Permitting Official

Steven M. Pirner
Secretary
Department of Environment and Natural Resources

Permit No.: DRAFT 10/08/15

Note: This page will be replaced with a copy containing the assigned permit number and indicating whether the permit is a state or federally enforceable National Pollutant Discharge Elimination System permit once coverage is authorized.

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