PROPOSED AMENDMENTS TO ARSD 74:09

PROCEDURES

BOARD OF MINERALS AND ENVIRONMENT

April 17, 2014

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1.0 Background

The Air Quality Program within the South Dakota Department of Environment and Natural Resources (DENR) implements federal air pollution control programs. There are several different types of air pollution control program and each program has a different procedure by which the U.S. Environmental Protection Agency (EPA) gives states the authority to implement the federal air pollution control program.

The first type of federal air pollution control program is known as a State Implementation Plan. A State Implementation Plan contains state rules that are used to meet and/or maintain the federal National Ambient Air Quality Standards. If a state does not develop a State Implementation Plan, EPA is required to establish a Federal Implementation Plan in its place. South Dakota currently has a State Implementation Plan in place to meet and/or maintain the federal National Ambient Air Quality Standards.

Each time DENR revises its rules that impact the State Implementation Plan, EPA reviews the state's rules to determine if the rules are equivalent to the federal air pollution control program. If the state's rules are equivalent, EPA includes the state's rules in the State Implementation Plan after public noticing its decision in a federal register notice. Before a state rule is approved by the EPA, it is only enforceable by the state. After being approved by the EPA, a state rule is federally-enforceable and can be enforced in court by the state and federal government as well by the public under the citizen suit provision of the Clean Air Act.

A second type of federal air pollution control program is a delegated program. Under these programs, the EPA maintains the overall authority and interpretation of the program. A state is granted the authority to implement and enforce the program in lieu of EPA. The first step in requesting delegation is to adopt state rules that are equivalent to the federal air pollution control program. Adopting the federal regulations by reference is the simplest method DENR has found to achieve this goal. The most notable EPA delegated federal air pollution programs in South Dakota's rules are the New Source Performance Standards (ARSD 74:36:07) and the National Emission Standards for Hazardous Air Pollutants (ARSD 74:36:08).

Again, each time DENR revises its rules that impact a delegated federal air pollution program, EPA reviews the state's rules to determine if the rules are equivalent to the federal air pollution control program. If the state's rules are equivalent, EPA notifies the state that they are delegated to implement the federal air pollution control program.

A third type of federal air pollution control program is an EPA approved program. As with the first two federal air pollution control programs, the first step in receiving an approved program is to adopt state rules that are equivalent to the federal air pollution control program and submit the rules to EPA for approval. The most notable EPA approved program in South Dakota's rules is the Title V air quality operating permit program (ARSD 74:36:05).

Again, each time DENR revises its rules that impact an approved federal air pollution program, EPA reviews the state's rules to determine if the rules are equivalent to the federal air pollution

control program. If the state's rules are equivalent, EPA approves the state's rules after public noticing its decision in a federal register notice.

Recently, EPA determined that many of the state implementation plans, including South Dakota's, relating to Section 128 of the Clean Air Act requirement were not sufficient. Section 128 of the Clean Air Act specifies the requirements for a state board or body that approves air quality permits or enforcement orders. The specifications for the state board or body deal with the makeup and any potential conflict of interest. The Board of Minerals and Environment has the potential to approve air quality permits and enforcement orders, therefore, DENR needs to satisfy the requirements in Section 128 of the Clean Air Act to maintain and implement the federal air pollution control programs that are part of the State Implementation Plan.

South Dakota Codified Laws (SDCL) 1-40-25.1 currently addresses the Board of Minerals and Environment's makeup but was never submitted to EPA for inclusion in the State Implementation Plan. DENR is proposing revisions to Article 74:09 (Procedures – Board of Minerals and Environment) to address the potential conflicts of interest requirements. If approved, DENR will submit SDCL 1-40-25.1 and the proposed revisions in Appendix A to EPA as part of South Dakota's State Implementation Plan.

2.0 National Ambient Air Quality Standards

EPA has established National Ambient Air Quality Standards for a list of air pollutants termed criteria air pollutants. There are six criteria air pollutants (i.e., particulate matter, sulfur dioxide, nitrogen dioxide, ozone, lead and carbon monoxide). There are two types of National Ambient Air Quality Standards established for each criteria air pollutant, primary and secondary. Primary standards define levels that protect the public health with a margin of safety. The secondary standards define levels to protect the public welfare from known or anticipated adverse effects from air pollution. EPA is required by the Clean Air Act to review the standards every five years and revise, add additional standards, or not change the standards based on its review. Since 1997, EPA has revised the criteria air pollutant standards eight times (i.e., three times for particulate matter, two times for ozone, once for lead, once for sulfur dioxide, and once for nitrogen oxide).

Each time EPA revises or adds a national ambient air quality standard for a criteria air pollutant, each state is required to demonstrate its current State Implementation Plan is sufficient to meet and maintain the revised or added national ambient air quality standard. This typically involves adopting the revised or added national ambient air quality standard in state rule and demonstrating through existing ambient air monitoring data that South Dakota is achieving the revised or added standard. In addition, each state must submit what is called an infrastructure State Implementation Plan certifying the state implementation plan is equivalent to EPA's regulations and is meeting the requirements of the Clean Air Act.

2.1 State Implementation Plan

As EPA continues to update their regulations and National Ambient Air Quality Standards, DENR must also update the state regulations and request approval from EPA to add the changes to South Dakota's State Implementation Plan. From the federal side, South Dakota's State Implementation Plan for federal air pollution control programs is located at 40 Code Federal Regulations Part 52 Section 52.2170 and is located at the following website:

http://www.ecfr.gov/cgi-bin/text-idx?SID=2e4398943ae5e0bbc1c5768651d86e72&node=40:5.0.1.1.1.4&rgn=div

This federal section contains a history of South Dakota's State Implementation Plan submittals dating back to our initial State Implementation Plan in 1972 to the current State Implementation Plan.

The State Implementation Plan specifies how South Dakota will implement, maintain and enforce the National Ambient Air Quality Standards in all areas of South Dakota. The State Implementation Plan primarily consists of certain chapters and sections of the state rules. For example, Chapter 74:36:02 – Ambient Air Quality is part of the State Implementation Plan where DENR has adopted the federal National Ambient Air Quality Standards. This chapter also specifies where DENR establishes ambient air monitoring sites and what type of criteria air pollutant to monitor at each site. DENR's ambient air monitoring network is displayed at the following website:

http://denr.sd.gov/des/aq/monitoring/state-mo.aspx

Chapter 74:36:04 – Operating Permits for Minor Sources and 74:36:09 – Prevention of Significant Deterioration are also part of the State Implementation Plan used to permit businesses and facilities and establish air emission limits to ensure South Dakota maintains its ambient air quality below the National Ambient Air Quality Standards.

2.2 Infrastructure Certification

Section 110(a)(1) and (2) of the Clean Air Act requires each state to review its State Implementation Plan each time EPA revises or adds a criteria air pollutant national ambient air quality standard. Following the change to the standard, the state has a three year period to update the state's plan and implement the revised regulations. At the end of the three year period the state is required to certify the infrastructure of its plan is equivalent to EPA's regulations and is meeting the requirements of the Clean Air Act. The results of the state's infrastructure review are required to be reasonably noticed and hold a hearing if one is requested to allow public participation in the review process. Once the public comment period and hearing, if one is requested, is complete, DENR sends EPA a request to approve the infrastructure certification and includes any comments received or sent during the public process. EPA then reviews the infrastructure certification. If EPA determines something is missing in South Dakota's State Implementation Plan, EPA will partially approve or disapprove the certification.

DENR has submitted infrastructure certifications on seven of the eight standard changes (i.e., two for particulate matter, two for ozone, one for lead, one for sulfur dioxide, and one for nitrogen oxide). DENR will need to submit another infrastructure certification to EPA for the most recent revision to the particulate matter standard by March 18, 2016.

The seven infrastructure certifications DENR submitted are currently being reviewed by EPA. During EPA's review of DENR's infrastructure certification and other state infrastructure certification, EPA determined that many of the state implementation plans relating to Section 128 of the Clean Air Act requirement were not sufficient. Therefore, DENR is proposing revisions to satisfy the requirements in Section 128 of the Clean Air Act to maintain and implement the federal air pollution control programs that are part of the State Implementation Plan.

3.0 Proposed Revisions to Chapter 74:09:01 – Contested Case Procedure

EPA notified DENR that South Dakota's State Implementation Plans does not comply with Section 128 of the Clean Air Act. Section 128 of the Clean Air Act specifies:

> *(a) Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that—*
>
> > *(1) any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this chapter, and*
> >
> > *(2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.*
>
> *A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of paragraph (1) and (2), and the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.*

South Dakota Codified Laws (SDCL) 1-40-25.1 currently addresses the Board of Minerals and Environment's paragraph (a)(1) of section 128 of the Clean Air Act that specifies the makeup of the state board. This statute went into effect in 1995 and was referenced by DENR in its package to EPA for receiving approval of DENR's Title V air quality operating program. As stated before, an EPA approved program is not part of South Dakota's State Implementation Plan. Therefore, DENR will submit SDCL 1-40-25.1 to EPA as part of South Dakota's State Implementation Plan. SDCL 1-40-25.1 states:

> *1-40-25.1. Board of Minerals and Environment composed in conformance with Clean Air Act. In addition to the provisions of § 1-40-25, the Board of Minerals and Environment shall be composed in conformance with the requirement of the Clean Air*

Act § 128 (42 USC § 7428) as amended to January 1, 1995, for all permits and enforcement orders initiated under chapter 34A-1.

DENR discussed whether the potential conflicts of interest provision should be in statute or rule with the Attorney General's Office. The Attorney General's Office indicated it could be in either location. Due to timing, DENR recommends the potential conflict of interest language be established in sections 74:09:01:20 and 74:09:01:21 to Article 74:09 – Procedures Board of Minerals and Environment as noted in Appendix A. These two sections specify the conditions when a Board member may not participate in a contested case hearing, and are based on case law of the South Dakota Supreme Court concerning board member conflicts of interest in contested case proceedings held under SDCL ch. 1-26 (*Armstrong v. Turner County Board of Adjustment*, 2009 SD 81).

APPENDIX A

REVISIONS

TO

ADMINSTRATIVE RULES

OF

SOUTH DAKOTA

74:09

ARTICLE 74:09

PROCEDURES -- BOARD OF MINERALS AND ENVIRONMENT

Chapter

74:09:01 Contested case procedure.

CHAPTER 74:09:01

CONTESTED CASE PROCEDURE

Section

74:09:01:01 Petition to initiate contested case.

74:09:01:02 Board initiation of contested case.

74:09:01:03 Answer to petition to initiate contested case.

74:09:01:04 Intervention in contested case.

74:09:01:05 Initiation of enforcement hearing.

74:09:01:06 Intervention in enforcement hearings not allowed.

74:09:01:07 Pleadings to be filed with department.

74:09:01:08 Appointment of chair of hearing.

74:09:01:09 Motions.

74:09:01:10 Prehearing conference.

74:09:01:11 Notice of contested case.

74:09:01:12 Subpoenas.

74:09:01:13 Conduct of hearings.

74:09:01:14 Transcripts.

74:09:01:15 Service.

74:09:01:16 Degree of proof required.

74:09:01:17 Appointment of hearing examiner.

74:09:01:18 Decision of board.

74:09:01:19 Findings of fact, conclusions of law, and orders.

74:09:01:20 Board member conflict of interest

74:09:01:21 Board member potential conflict of interests

ARSD 74:09:01:20. Board member conflict of interest. A board member who is personally related to a party involved in a contested case hearing by two degrees of consanguinity, who has a direct financial interest in a party involved in a contested case hearing through employment or by contract, or whose spouse is employed by or directly contracts with a party involved in a contested case hearing, may not participate in a contested case proceeding concerning that party. The member shall make an oral statement of recusal on the record at the initiation of the hearing in the contested case. A recused member may not participate in board discussions or decision-making regarding that contested case proceeding.

Source:

General Authority: SDCL 34A-1-6, 34A-6-1.6, 34A-6-1.14, 34A-11-9, 45-9-13.

Law Implemented: SDCL 1-26-27, 34A-1-21, 34A-1-43, 34A-1-44, 34A-1-45, 34A-1-46.

ARSD 74:09:01:21. Board member potential conflicts of interests. A potential conflict of interest is an indirect financial interest, or a personal relationship or another interest in a party involved in a contested case hearing or enforcement hearing that is different from that of the general public, that a reasonable person would believe might result in bias or prejudgment of a contested case hearing. Board members shall disclose any potential conflict of interest in a contested case proceeding on the record at the initiation of the hearing, or during the hearing if they become aware of the existence of a potential conflict of interest. Upon its own motion or the motion of a party, the Board may recuse a member with a potential conflict of interest if it determines that the potential conflict of interest raises an unacceptable risk of bias or prejudgment in the contested case proceeding.

Source:

General Authority: SDCL 34A-1-6, 34A-6-1.6, 34A-6-1.14, 34A-11-9, 45-9-13.

Law Implemented: SDCL 1-26-27, 34A-1-21, 34A-1-43, 34A-1-44, 34A-1-45, 34A-1-46.