

OFFICIAL OPINION NO. 75-95, Authority of the Department of Environmental Protection to regulate bulk water haulers, public water supplies (excluding fluoridation) and public swimming places

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Allyn Lockner, Secretary  
Department of Environmental Protection  
4th Floor Office Building No. 2  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 75-95

**Authority of the Department of Environmental Protection to regulate bulk water haulers, public water supplies (excluding fluoridation) and public swimming places**

Dear Secretary Lockner:

You have requested my official opinion as to the authority of the Department of Environmental Protection to regulate bulk water haulers, public water supplies (excluding fluoridation) and public swimming places.

SDCL 46-25-33.1 provides:

The board of environmental protection shall pursuant to chapter 1-26 adopt rules regulating public water supplies, public swimming places, and bulk water haulers and fix laboratory fees. The provisions of this section shall not invalidate any rules of any agency existing prior to July 1, 1974.

From the above cited statute it is clear that the Legislature intended that the Board of Environmental Protection *shall adopt rules to regulate* the matters specified. The fact that the Legislature *required* the board to pass *rules which regulate* these areas obviously indicates that there was a delegation of rule making authority to the board which the Legislature expected to be acted on. The question then is not *whether* the board can regulate, but rather is *how and to what extent* these activities can be regulated by the board on the basis of existing laws.

1. Are there sufficient guidelines present for the Board of Environmental Protection to pass rules which regulate the activities enumerated in SDCL 46-25-33.1?

The South Dakota Supreme Court said in the case of *Affiliated Distillers Brands v. Gillis*, 81 S.D. 44, 130 N.W. 2d 597, 599 (1964) that there must be both an expressed legislative will and legislative guidelines for the valid promulgation of administrative rules. The court has since indicated in the case of *Berdahl v. Gillis*, 81 S.D. 436, 136 N.W. 2d 633, 636. (1965) that the former *Gillis* case was decided on the basis of a total lack or absence of standards and not on the insufficiency of such standards. In the first *Gillis* case cited above, the appeal involved the issue of whether or not the Department of Revenue's rules relating to the size of alcoholic beverage containers were lawful. The court in looking to applicable statutes delegating rule making authority to the department found that: 1) there was no specific grant of power to the commissioner of revenue to make rules with respect to container size; 2) that the statute which empowered the commission to promulgate "any reasonable regulations not inconsistent with this title or with federal laws or regulations to effect the objects of this title, including, among others, regulations to insure purity of alcoholic beverages and true statements as to the contents of any container thereof" did not lay down sufficient standards to guide the commissioner's action in this regard.

In my view SDCL 46-25-33.1 does set down more adequate standards than those discussed in the *Gillis* case above. The *Gillis* case specifically notes there was no statement of legislative purpose involved in that factual situation. In the case of SDCL 46-25 there is legislative purpose stated in SDCL 46-25-23, which in my view, must be seen as applying to SDCL 46-25-33.1 even though SDCL 46-25-33.1 was not part of the original chapter 280 of the session laws of 1973. SDCL 46-25-23 therefore, sets policy guidelines which further limits the specific regulatory power granted to the board in SDCL 46-25-33.1.

2. Can the Board of Environmental Protection promulgate a rule which defines public water supply?

The answer to your question is YES. In view of SDCL 46-25-33.1 cited above, it is my opinion that the board can more specifically define the meaning of "public water supplies" which their regulations will cover. Generally, it is my view that the power to regulate and pass rules entails the power to pass "definitional rules" in the area authorized which reasonably clarify and which relate to the matter being regulated and which are not inconsistent with statutory definitions or other provisions of law.

3. Can the Board of Environmental Protection promulgate rules which establish safe drinking water standards?

SDCL 46-25-23 states that it is the public policy of the state of South Dakota to protect and improve the quality of water supplies for several purposes, among which is the purpose of "domestic use." When this statutory provision is viewed together with the provisions of SDCL 46-25-33.1 it is my view that the Board of Environmental Protection is authorized to prescribe reasonable rules which establish pollution safe drinking water standards for public water supplies and for bulk water haulers who sell water for domestic use. This does not mean, however, that the board would be authorized by these statutes to go so far as setting siting requirements for new public water facilities as per your question one subdivision E.

4. Can the Board of Environmental Protection pass rules relating to the surveying or inspecting of public water supply systems?

Since the board has the authority to set reasonable standards for public water supplies which address the problems of "pollution" it is my opinion that the board also is authorized to pass rules which allow for reasonable inspection and monitoring of such systems so as to provide for enforcements of the regulations and standards passed. It is my view that the power to pass rules to regulate a particular matter implies that reasonable rules relating to inspection and monitoring to enforce such regulations are also allowable. *Utah, Idaho Sugar Company v. Temmey*, 68 S.D. 623, 5 N.W. 2d 486 (1942).

5. May the Board of Environmental Protection pass rules which set fees for laboratory analysis provided by the department personnel for nongovernmental users of such a laboratory analysis?

The answer to your question is YES. SDCL 46-25-33.1 and 46-25-23 provide authorization for the board to fix laboratory fees which in my opinion are limited to testing for water pollution and which would apply to nongovernmental users of the laboratory services of the department.

6. May the Board of Environmental Protection pass rules which allow the secretary of the department to issue an emergency order to eliminate the violation of the safe drinking water standard which will result in a serious risk to the public health?

The answer to your question is YES. SDCL 46-35-84 is in my view authority for the secretary of the department to issue emergency orders. The board may in my opinion pass reasonable rules relating to such orders, but may not prescribe rules that conflict with SDCL 46-25-84 to 46-25-87.

7. May the Board of Environmental Protection pass rules which regulate the operation and maintenance of public water supply systems?

The answer to this question is NO. The authority granted by SDCL 46-25-33.1 and 46-25-33 does not expand so broadly that regulation of the public water supply *systems* is authorized. It is my view that the above statutes authorize the board to regulate water quality, but not the actual operation of the system itself. Before the board 'can legitimately regulate such activities, additional statutory authorization is required.

8. May the Board of Environmental Protection pass rules which allow for variances and exemptions from the safe drinking water standards?

If the board sets forth the criteria that will determine the issuance or denial of a variance or exemption and if these criteria are otherwise lawful, then the board may promulgate rules relating to such exemptions and variances.

9. May the Board of Environmental Protection pass rules establishing criteria and procedures to assure that public swimming pools and public swimming beaches are bacteriologically safe and that these facilities are properly operated and maintained and are safe for swimming?

In my opinion, the board does not have the authority to pass rules relating to the "proper operation and maintenance" of public swimming areas. The board does have the authority to pass rules which relate to water in such areas meeting certain water quality standards and consequently being safe for swimming. The matters of proper operation and maintenance of a beach are not, however, included in this limited grant of authority.

10. May the Department of Environmental Protection accept financial assistance from the United States government to carry out public water supply regulatory activities?

The above question is difficult to answer because it is so open ended. If the federal government is satisfied that the department can meet their standards relating to distribution of such funds, I see no legal reason why the department could not accept such assistance. (See SDCL 46-25-23 and 46-25-98.)

11. May the Department of Environmental Protection pass rules which establish an annual water hauler permit fee and set required sanitation and construction criteria for tanks and equipment used for commercial "domestic use" water haulers?

It is my view that SDCL 46-25-33.1 does not give the Department of Environmental Protection the power to set a fee for bulk water hauler permits. The reference to setting of fees in SDCL 46-25-33.1 is specifically to the fixing of laboratory fees, not for setting permit fees.

With regard to the matter of setting construction and sanitation criteria it is my view that the department may only regulate the level of "water quality" which must be maintained by bulk water haulers. There is not any authority in SDCL 46-25 for going beyond to the regulation of the equipment used by bulk water haulers. Additional statutory authority is needed for the department to expand into the regulation of setting permit fees and setting construction and sanitation criteria.

Respectfully submitted,

WILLIAM J. JANKLOW  
ATTORNEY GENERAL

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