

OFFICIAL OPINION NO. 88-34, Waters of the State

July 20, 1988

Mr. John J. Smith
Secretary
Department of Water and Natural Resources
Joe Foss Building
Pierre, South Dakota 57501

Official Opinion No. 88-34

RE: Waters of the State

Dear Secretary Smith:

You have asked for my opinion concerning the following factual situation:

FACTS:

The department of water and natural resources ("DWNR") is charged with the duty of administering the pollution control laws of the state, including SDCL 34A-2, the state's water pollution control statutes, and the regulations promulgated thereunder. SDCL 34A-2-21, 34A-2-22, 34A-2-24, and 34A-2-27 prohibit, except under certain circumstances, polluting the "waters of the state." Regulations define the conditions under which concentrated animal feeding operations ("feedlots") are held to violate these statutes. These state statutes and regulations operate in conjunction with the federal Clean Water Act, including the national pollutant discharge elimination system ("NPDES") program administered in South Dakota by the Environmental Protection Agency ("EPA"). EPA has issued regulations governing feedlots in the United States. Pursuant to these regulations, a NPDES permit is required if a feedlot fits the definition of a concentrated animal feeding operation and discharges into waters of the United States.

Water contaminated by animal wastes runs off the Fort Pierre Livestock Auction into the road ditch along U.S. Highway 83 in the City of Fort Pierre, through a drainage ditch crossing a residential area and into the Fort Pierre slough. Neither the highway ditch nor the drainage way into the slough are permanent streams but are intermittent, man-made drainage ditches. Manure from the auction may have been dumped directly into the

slough. EPA has determined that it does not have jurisdiction over these discharges on the basis of a 1984 decision by the United States Eighth Circuit Court of Appeals holding that the Fort Pierre slough is not waters of the United States.

Based upon these facts, you have asked the following questions:

QUESTIONS:

1. Is water in the drainage ditch adjacent to Highway 83 or in the drainage ditch running from Highway 83 to the Fort Pierre slough, both within the City of Fort Pierre, "waters of the state"?
2. Is the Fort Pierre slough "waters of the state"?
3. If either the ditches or the slough constitute "waters of the state", what are the duties of the Secretary under SDCL 34A-2-23, 34A-2-48 or other provisions of law relative to discharges from a feedlot in violation of state water pollution laws, given the division of jurisdiction and responsibility between the federal EPA and the state DWNR?

IN RE QUESTIONS NO. 1 AND NO. 2:

"Waters of the state" is a phrase defined by the Legislature at SDCL 34A-2-2(12) as follows:

... all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state; ...

This same definition is in the administrative rules of the Water Management Board dealing with surface water discharge permits. See ARSD 74:03:17:01(54).

SDCL 2-14-1 provides that words used in the code are to be understood in their ordinary sense. See *American Rim and Brake, Inc. v. Zoellner*, 382 N.W.2d 421 (S.D. 1986); *Meyerink v. NWPS*, 391 N.W.2d 306 (S.D. 1987). Examining the definition in that light, and taking into consideration the statement of legislative policy found at SDCL 34A-2-

1, it is my opinion that both the drainage ditches and the slough fall within the definition of waters of the state. My answer to questions 1 and 2 is yes.

IN RE QUESTION NO. 3:

SDCL 34A-2-21 provides:

No person may cause pollution of any waters of the state, or place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state.

SDCL 34A-2-22 provides:

No person may discharge any wastes into any waters of the state which reduce the quality of such waters below the water quality level existing on March 27, 1973.

Violations of either statute are declared a public nuisance. SDCL 34A-2-23. In addition, violation of these statutes could subject a person to a civil penalty of up to \$10,000 per day for each day of violation. SDCL 34A-2-76. Finally, violation of either section is a Class I misdemeanor.

It appears that you would have several options available to you in dealing with the factual situation you describe, assuming for the present a statutory violation exists. Initially,

SDCL 34A-2-53 provides for issuing a notice of violation:

If the secretary has reason to believe that a violation of this chapter or any rule made or permit issued under it is threatened or has occurred, he shall cause written notice to be served personally or by mail upon the alleged violator or his agent. The notice shall state the provisions alleged to be violated, the facts alleged to constitute a violation, the nature of any corrective action proposed to be required, and the time within which such action is to be taken. For the purpose of this chapter, service by mail shall be deemed complete on the date of mailing.

A procedure is set out for a hearing before the water management board to determine whether there has been a violation of the statutes, and to provide for appropriate corrective action. SDCL 34A-2-54 to 34A-2-60.

Secondly, you have authority to issue an emergency order to "stop, avoid or moderate" an act which "will cause substantial pollution, the harmful effects of which cannot be remedied immediately after the commission or cessation of the act." SDCL 34A-2-68. You must hold a hearing on such order within 5 days. SDCL 34A-2-70. In the alternative the department may proceed directly in circuit court for an injunction where there is "an imminent and substantial endangerment to the health of persons or to the welfare of persons" or where "a person is violating or threatening to violate any of the provisions of this chapter...." SDCL 34A-2-72. It is also possible to seek a civil penalty or criminal sanctions in circuit court. SDCL 34A-2-75; 34A-2-76.

As you point out, the U.S. Environmental Protection Agency under the National Pollutant Discharge Elimination System (NPDES) also exercises regulatory jurisdiction in this area. The EPA has determined, however, that it does not have jurisdiction in this case based upon the decision in *United States v. City of Ft. Pierre*, 747 F.2d 464 (8th Cir. 1984). There, the court of appeals determined that the Ft. Pierre slough is not a "water of the United States" for purposes of Corps of Engineer's jurisdiction over wetlands. Although the court held that its "holding is limited to the situation in which the Corps, as an unintended byproduct of ordinary river maintenance, inadvertently created a wetland--type ecological system on private property where no such system previously existed", the EPA apparently feels bound by the determination as it relates to its jurisdiction. Compare *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455 (1985).

In my opinion, however, the EPA's decision not to exercise its NPDES authority does not deprive the Department of the ability to enforce similar regulations under state law. Although state water pollution laws in many instances mirror federal law, the scope of the state law is broader, for the simple reason that "waters of the state" encompasses more waters than "waters of the United States." While federal preemption questions may arise if the Ft. Pierre slough was a water of the United States, it has been found not to be. Accordingly, the Department is able to enforce the state standards. See *International Paper Co. v. Oullette*, 107 S.Ct. 805 (1987).

Based upon the correspondence attached to the opinion request, the EPA concluded that if it had jurisdiction over this matter, the livestock auction market would be regulated as a concentrated animal feeding operation, and would have to be a no discharge facility for all events less than a 25 year, 24 hour storm event. 40 CFR § 412.13(b). That standard is part of the EPA guidelines to regulate feedlots.

The concomitant state regulations are part of the new surface water discharge permit program. ARSD 74:03:17:74:03:18. Concentrated animal feeding operations are listed as examples of point sources requiring surface water discharge permits ARSD 74:03:17:03(1). A concentrated animal feeding operation is defined at ARSD 74:03:18:21 and 74:03:18:27. An animal feeding operation is a lot or facility where animals are "confined and fed or maintained" for a total of 45 or more days in a 12 month period. ARSD 74:03:18:21(1)(a). The animal feeding operation may be determined to be "concentrated" by any of three different methods, as described in ARSD 74:03:18:23 and 74:03:18:27. Effluent limitations on such operations are to be for no discharge except for a 25 year, 24 hour storm event. ARSD 74:03:18:28.

It seems to me to be at least arguable whether a livestock auction market, which typically holds animals on a short term basis for purposes of sale, satisfies the definition of an animal feeding operation, especially because the rule is aimed at feedlots. That, however, is a factual determination the permitting authority will have to make. Assuming that the livestock auction market is a concentrated animal feeding operation, and I'm not confident that it is, under the rules, it would have to comply with ARSD 74:03:18:28, and would need a surface water discharge permit, even though an NPDES permit is not required.

In my opinion, in view of the fact that the livestock yard has drained into the slough for some time, the most reasonable approach would be to utilize the notice of violation procedure found at SDCL 34A-2-53. This assumes that you conclude that the facility is a concentrated animal feeding operation which requires a permit, or that it is a violation of water quality standards if it is not such a facility.

Respectfully submitted,

Roger A. Tellinghuisen
Attorney General