

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

Section I. General

This Memorandum of Agreement (hereafter, AGREEMENT) establishes policies, responsibilities and procedures pursuant to 40 CFR Part 123 and defines the manner in which the National Pollutant Discharge Elimination System (NPDES) will be administered by the South Dakota Department of Environment and Natural Resources (hereinafter, the SDDENR) and reviewed by Region VIII of the United States Environmental Protection Agency (hereinafter, EPA). All additional agreements between the SDDENR and EPA are subject to review by the Administrator of the U.S. Environmental Protection Agency (hereinafter, the ADMINISTRATOR), and the Secretary of the South Dakota Department of Environment and Natural Resources (hereinafter, the SECRETARY). If the ADMINISTRATOR determines that any provision of any such agreement does not conform to the requirements of Section 402(b) of the Federal Clean Water Act, 33 U.S.C. 1251 et seq., as amended (hereinafter, the CWA), to the requirements of 40 CFR Parts 122-125, 40 CFR Part 403 or other applicable Federal regulations the ADMINISTRATOR shall notify the SECRETARY and the Regional Administrator of EPA (hereinafter, the REGIONAL ADMINISTRATOR), of any proposed revisions or modifications which must be made in such agreements.

The SECRETARY and the REGIONAL ADMINISTRATOR hereby agree to maintain a high level of cooperation and coordination between the SDDENR and EPA staffs in a partnership to assure successful and effective administration of NPDES. In this partnership, EPA will provide on a continuing basis, technical and other assistance to the SDDENR on permit matters. If requested by either party, meetings between the SDDENR and EPA will be scheduled at reasonable intervals to review specific operating procedures or, resolve problems.

The SDDENR and EPA may amend this Memorandum of Agreement from time to time. Amendments will be put in writing, and signed by the SECRETARY and the REGIONAL ADMINISTRATOR. In addition, separate subagreements which relate to implementation of the SWDS in South Dakota may be entered into by the SDDENR and EPA.

Section II. Policies

The SDDENR has primary responsibility for implementing the NPDES program for South Dakota and will administer NPDES in accordance with Section 402 of the CWA, 33 U.S.C. § 1251 et. seq., applicable STATE legal authority, applicable Federal regulations, the

State/EPA Agreement (hereinafter, SEA), the Description of the State Program, this AGREEMENT, the Enforcement Agreement, and any other agreements. All agreements shall be consistent; however, the basic requirements of this MOA shall override any other agreements as required by 40 CFR § 123.24. The SDDENR's program equivalent to the NPDES will be the Surface Water Discharge System (SWDS). The SDDENR has the primary responsibility to establish State NPDES program priorities which are consistent with national NPDES goals and objectives.

A. SDDENR Responsibilities

In accordance with the priorities and procedures established in this AGREEMENT and the SEA, the SDDENR will:

1. Develop and maintain the legal authority (including State regulations) and the resources required to carry out the level of effort agreed to by the SDDENR and EPA for all aspects of the SWDS.
2. Process in a timely manner and propose to issue, reissue, modify or deny all SWD permits, including general permits, for discharges to surface waters of the State, including, the following categories of applicants:
 - a. Industrial, commercial, mining and silvicultural dischargers and Federal facilities as outlined in Section III of this AGREEMENT;
 - b. Animal feeding operations, aquatic animal production facilities and aquaculture projects (as defined in 40 CFR 122.23 to 122.25) as outlined in Section 318 of the CWA, 40 CFR Part 125 Subpart B, Section III of this AGREEMENT;
 - c. Publicly Owned Treatment Works (POTWs) including those which dispose of sewage sludge as outlined in Section 405 of the CWA, and Section III of this AGREEMENT;
 - d. Any other categories which may be identified.All permits shall conform to the requirements of the CWA, 40 CFR 122.21-25, and applicable state legal authority. Permit applications by EPA designated major dischargers shall normally receive first priority in all NPDES activities.
3. Comprehensively evaluate and assess compliance with compliance schedules, effluent limitations and other conditions in these permits as outlined in Section IV of this AGREEMENT.
4. Maintain a program of taking timely and appropriate enforcement action in accordance with the CWA and as outlined in Section IV of this Agreement, the Enforcement Management System, and the Enforcement Agreement.
5. Maintain a program to carry out the pretreatment responsibilities outlined in Section VI of this AGREEMENT.
6. Maintain an adequate and orderly public file which will be easily accessible to EPA for audit purposes for each permittee. Such files must, include at a minimum copies of:
 - a. Permit Application;
 - b. Issued Permit and the Previously Issued Permit;
 - c. Public Notice and Statement of Basis, including addendums;
 - d. Discharge Monitoring Reports;
 - e. All inspection reports;

- f. All enforcement actions; and
- g. All pertinent information and correspondence.
7. The SDDENR will submit to the REGIONAL ADMINISTRATOR the information described in Section VII of this AGREEMENT, the SEA and applicable portions of 40 CFR Part 123.
8. Maintain in a timely, complete and accurate manner all required data elements in EPA's Permit Compliance System (PCS), in accordance with the PCS policy statement.
9. Operate a Discharge Monitoring Report - Quality Assurance Program and conduct follow-up with dischargers who do not perform satisfactorily on test samples.
10. Cooperate with EPA in the administration of the NPDES program in accordance with EPA program policies and guidance.
11. As resources allow, provide for a Continuing Planning Process (40 CFR 130.5) and Water Quality Management Planning (40 CFR 130.6)
12. The Secretary or his/her designee will comply with 40 CFR 123.25 (c).
13. The SDDENR will allow intervention, as of right, in civil proceedings to at least the same extent required by 40 CFR 123.27 (d) (1). The SDDENR shall not oppose citizen intervention in administrative proceedings, as provided by SDCL 34A-10-2.

B. EPA Responsibilities

1. EPA will commit funding to the SDDENR, to the maximum extent possible to support its SWDS efforts.
2. Where no effective guidelines exist for a discharge, EPA will provide technical assistance in writing permit terms and conditions, for example, contractor reports, draft development documents, and available effluent data from similar facilities. Such information will be provided within 30 days of request by the SDDENR when available.
3. As outlined in Section VIII of this AGREEMENT, EPA will oversee the SDDENR administration of the SWDS on a continuing basis for consistency with the CWA, this AGREEMENT, the Description of State Program, the SEA, and all applicable Federal regulations. In addition, EPA may consider as part of its assessment, comments from permittees, the public, and Federal and local agencies concerning the SDDENR's administration of the SWDS. Any such comments considered by EPA will be brought to the attention of the SDDENR by written correspondence, if the commenting party has not previously communicated directly with the SDDENR.
4. EPA will provide the SDDENR with a public notice mailing list, a complete listing of all EPA regulations and guidelines applicable to the program at the time of assumption, and make available on a timely basis copies of all proposed and final revisions, guidelines or modifications to these regulations.
5. EPA will provide the SDDENR with the necessary assistance to implement PCS.
6. EPA will ensure that the SDDENR is kept fully informed and up to date concerning:
 - EPA contractor reports; draft and final EPA development documents; and draft, proposed and final ELG regulations for various industry categories.

- Draft and final settlement agreements between EPA and litigants, where available, which concern the interpretation or modification of ELG regulations for various industry categories.
 - Draft, proposed, and final versions of EPA regulations, technical guidances, policy and procedures which pertain to implementation of the NPDES program and water quality planning program.
7. EPA will provide SDDENR with the opportunity for meaningful involvement in program development activities and program initiatives. EPA will keep SDDENR informed of development of NPDES program policy statements, strategies and related guidance, and provide for input by the SDDENR when appropriate.
 8. As outlined in section VII of this Agreement, EPA will oversee the administration of NPDES on a continuous basis for consistency with the CWA, this Agreement, the annual program plan, and all applicable federal regulations and policies. EPA will, as a part of its assessment, consider among other things, revised permits, reports, and enforcement actions submitted by the SDDENR and may also consider comments from permittees, the public, and federal and local agencies concerning the SDDENR's administration of NPDES. Any such comments considered by EPA will be brought to the attention of the SDDENR by written correspondence if the commenting party has not previously communicated this comment to the SDDENR. Any information obtained or used by the SDDENR under the NPDES program shall be available to EPA upon request without restriction. If the information has been submitted to the SDDENR under a claim of confidentiality, the SDDENR shall inform EPA of that claim. EPA has been informed that all complaint forms signed in accordance with SDCL 34A-2-111 are to remain confidential. Claims of confidentiality will be treated in accordance with 40 CFR Part 2, Subpart B; and 40 CFR 122.7.

C. Jurisdiction over Permits

Upon the Administrator's approval of the SWDS, jurisdiction over permits will be as follows:

1. The SDDENR will assume responsibility for NPDES, including permitting, compliance assurance, and enforcement activities as scheduled in Section X of AGREEMENT.
2. Permits which have been sent to EPA for review and public notice and evidentiary hearings that have been requested before the SWDS approval date will be handled by EPA until such requests have been finally resolved or final permits issued. As each request is resolved or final permit is issued, EPA will notify the SDDENR and transfer jurisdiction of that permit to the SDDENR and they become state issued permits in accordance with ARSD § 74:03:18:03. EPA will make every effort to resolve these issues in a timely manner. Also, permits under active enforcement (a list of which will be agreed upon by EPA and the SDDENR) before the SWDS approval date will be handled by EPA even after approval of the SWDS program. EPA shall handle these permits until final resolution of the enforcement action. As each enforcement issue is finalized, EPA will notify the SDDENR and transfer jurisdiction of that permit to the SDDENR.

See Section X for schedule of assumption of NPDES activities by the SDDENR.

Section III. Permit Review and Issuance

The SDDENR is responsible for drafting, public noticing, issuing, denying, modifying, reissuing, and terminating permits in accordance with this AGREEMENT and 40 CFR Parts 122-125, to the extent applicable to the SDDENR.

A. Transfer of Files from EPA to State

Upon approval of the SWDS by the ADMINISTRATOR, EPA will deliver requested items from their permit files to the SDDENR in accordance with Section X of this agreement so SDDENR permit files include all relevant information including but not limited to application forms, correspondence, proposed permits, public notices, statements of basis, and any other documents relating to the permit. EPA will ensure all requested items are complete prior to delivery to the SDDENR. The transfer will include the permit backlog (permit modifications, enforcement, etc.). EPA will ensure all files are complete and are in conformance with quantity and quality standards for permit files prior to delivery to the SDDENR.

B. Receipt of New Permit Applications by the SDDENR

Upon receipt of any completed permit application, the SDDENR will send EPA a complete application and enter into EPA's National Permit Compliance System, (PCS), all required information. The SDDENR will enter this information into PCS within thirty (30) working days of determination of a completed application. The completeness review will be conducted within sixty (60) working days after receipt of an application.

C. EPA Review of Proposed Permits and Permit Modifications

1. Unless otherwise waived, EPA will review all proposed permits. No later than the time of issuance of public notice, the SDDENR will send to the EPA, Region VIII, NPDES Branch one copy of the public notice, the proposed permit, and the Statement of Basis. EPA objections to the proposed permit, if any, will be made in accordance with the provisions of 40 CFR 123.44. EPA will make all reasonable efforts to provide any written detailed objections to and/or comments on the permit, within thirty (30) working days of receipt of the proposed permit. Upon request, EPA will be granted up to thirty (30) additional days for review of selected permits. All EPA comments and objections will be considered by the SDDENR along with any other public comments received in the preparation of the final permit.
2. Following expiration of the period for public comment, a final permit will be written. If (a) the proposed final permit is the same as or more stringent than the proposed permit defined in the public notice, (b) EPA has not objected to such proposed permit, in accordance with 40 CFR 123.44, and (c) valid and significant public comments have not been made, the SDDENR may issue the permit without further review by EPA (d) any changes from the proposed permit to the final permit would not be considered major or significant, requiring another public notice.

3. Following the receipt of an objection to a proposed permit by EPA, the SDDENR shall not issue the permit until all procedures required by 40 CFR 123.44 have been satisfied. If, after 90 days following receipt of an objection to a proposed permit by EPA, the SDDENR has failed to follow the procedures of 40 CFR 123.44, or otherwise fails to take adequate action to resolve the objection(s), EPA may issue the permit.
4. If, after a period of 360 days following receipt of an application for permit renewal, the SDDENR has failed to take action regarding the permit, it may be issued, denied, or modified and issued by EPA in accordance with 40 CFR 123.44.

D. Waiver of Permit Review by EPA

1. EPA waives the right to comment on, or object to, the sufficiency of permit applications, proposed permits, and final permits for all discharges or proposed discharges with the exception of the following:
 - a. Discharges which may affect the waters of a state other than South Dakota;
 - b. Proposed general permits (see 40 CFR 122.28);
 - c. Discharges from publicly owned treatment works with a daily average discharge exceeding 1.0 million gallons per day;
 - d. Discharges from any major discharger or a discharger within any of the industrial categories listed in Appendix A to 40 CFR 122;
 - e. Discharges from other sources with an average discharge exceeding 0.5 million gallons per day except that review of permits for discharge of non-process wastewater is waived, regardless of flow;
 - f. Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;
 - g. Discharges from pretreatment POTWs; and
 - h. Any discharge for which EPA specifically requests in writing the opportunity to comment on before or during the Public Notice period.

The foregoing does not include waiver of receipt of complete copies of Statements of Basis, applications, public notices of proposed permit issuance or denials, notices of public hearings, copies of all final permits issued, or any notices required under Section VI of this AGREEMENT.

2. With respect to modifications of permits, unless EPA specifically requests in writing the opportunity to review a modification, EPA waives the right to review the following:
 - a. A modification to any permit for which the right to review the original permit was waived (unless the modification would put the permit in one of the categories in Section III.D.1).
 - b. A modification to any permit which grants an extension of a schedule of compliance for 120 days or less for good and valid cause. However, only one such extension is waived. Any second extension for any permit must be submitted for review.

- c. A modification to any permit which makes minor changes to the monitoring requirements. Less frequent monitoring is not a minor change.
3. EPA reserves the right to terminate the waivers in paragraphs 1 and 2 above (in whole or in part) with respect to any specific discharger, at any time. Any such determination shall be accomplished by the EPA Regional Water Management Division Director in writing, and a copy of such written termination shall be delivered to the SDDENR. Notice of termination shall be given at least 30 days in advance of the termination date.
4. The foregoing waiver shall not be construed to authorize the issuance of permits which do not comply with applicable provisions of Federal or State laws, rules, regulations, or effluent guidelines, or to which EPA has objected. EPA may petition the SDDENR for review of any action or inaction because of violation of Federal or State laws, rules, regulations, or effluent guidelines.

E. Public Participation

1. All permit documents will be made available to any party upon request, upon payment of applicable state duplicating fees. Public access will be provided to NPDES files at all times during normal working hours.
2. Unless otherwise waived by the specific organization, the SDDENR will provide to the following organizations, copies of all public notices and Statements of Basis in accordance with 40 CFR 124.8 and 124.10:
 - a. U.S. Army Corps of Engineers;
 - b. U.S. Fish and Wildlife Service;
 - c. Advisory Council on Historic Preservation;
 - d. State Historic Preservation Center;
 - e. Other appropriate State and Federal Agencies;
 - f. Adjacent States and Indian Tribes (only for permits which affect them)
 - g. Major Commands of the Department of Defense (only for DOD permits)
3. All proposed general permits, major SWD permits, and pretreatment program approvals shall be public noticed in a daily or weekly newspaper within the area affected by the activity, in accordance with 40 CFR 124.10(c)(2)(i) or for pretreatment program approvals 40 CFR 403.11. During the public comment period, any interested person may submit written comments on the proposed permit or program approval and may request a public hearing, if no hearing has already been scheduled. A request for public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. The Secretary shall hold public hearings in accordance with 40 CFR 124.12. All comments shall be considered in making the final decision and shall be answered as provided in 40 CFR 124.17.
4. The SDDENR will investigate and respond to all citizen complaints where a signed complaint form has been received and will investigate all complaints received from other government agencies. At the time an unsigned complaint is received, SDDENR will determine whether appropriate department authorities exist under any state environmental statute to handle the unsigned complaint. If not, the citizen shall be referred to Emergency and Disaster Services; Game, Fish & Parks or another appropriate state agency. The appropriate State agencies shall

receive anonymous complaints and either investigate under their authorities or sign and refer the complaint to SDDENR.

F. Issuance of Permits or Notice of Intent to Deny

1. If the final determination is to issue the permit, it will be forwarded to the permit applicant, along with a transmittal letter notifying the applicant that the permit is being issued. Copies of all issued permits will be forwarded to EPA in accordance with the schedule contained in Section VII of this AGREEMENT.
2. If the final determination is to deny the permit, notice of intent to deny shall be given to the EPA, Region VIII, NPDES Branch and to the applicant in accordance with applicable SWDS rules.

G. Suspension or Revocation of Permits

When the SDDENR makes a determination to suspend, revoke, or terminate a permit, in whole or in part for cause, EPA will be notified. EPA will receive copies of any permit that has been revised as a result of administrative or court actions. The revisions will be identified and the Regional Administrator will have 30 days to provide written objections.

H. Major Discharger List

There shall be referenced as part of the annual State Inspection Plan a "Major Dischargers" list, which shall include those dischargers defined by the applicable definitions.

K. Variances

The SDDENR shall conduct an initial review of all requests for fundamentally different factors variances, for variances under §§301(c), (g), (i), (k), and 316(a) of the CWA, and for modifications to Federal effluent limitations established under section 302 of the CWA.

1. With regard to §§301(i) and (k) and 316(a) variances, the SDDENR may deny or approve the request. A copy of the determination shall be sent to the requester and EPA.
2. With regard to FDF's and 301(c) and (g) variances, and § 302 modifications, the SDDENR may determine to deny the request, and such determination shall be forwarded to the requestor and EPA. If the SDDENR determines that factors do exist that may warrant such a variance, the request and recommendation for approval shall be sent to EPA. If EPA denies a variance request, the SDDENR shall so notify the requestor. If EPA approves a variance request, the SDDENR will prepare a draft permit factoring in the variance.

L. Evidentiary Hearings (New NPDES Programs Only)

1. EPA will retain responsibility over permit appeals which are pending at the time of program approval. In the event such permit appeals remain unresolved at the time the EPA-issued permit expires, the SDDENR will assume jurisdiction over the appeal unless it agrees that a particular matter should be resolved by EPA.
2. The SDDENR will provide EPA with a copy of all precedent setting settlements and administrative decisions which impact the SDDENR's ability to implement the NPDES program in accordance with the federal requirements.

M. Endangered Species Act & National Historic Preservation Act

Discussions on delegation have taken place with the USFWS and State Historic Preservation Center. These initial contacts have been positive. SDDENR provides the following comments on the issue of these Acts:

1. Boilerplate of the §106 grant requires us to comply with federal law;
2. As EPA is currently doing, we will provide copies of the public notice to USFWS and the Historic preservation officer during the public notice period (See Section II. E. 2.);
3. Most of the permits will be renewals of permits for existing facilities. If there is a problem with these facilities it is thought comments would have been received during past public notice periods for these permits;
4. For new facilities, reviews are generally performed by these agencies before construction occurs;
5. As with anyone who responds during the public notice period, we will address legitimate issues before issuing the permit;
6. There is an appeals process built into the state system; however, if we cannot agree and EPA feels there are legitimate concerns which have not been addressed, they retain the right to veto any state issued permit; and
7. We will be required to make changes to our rules to specifically address this issue after the federal rules are amended.

Letters of concurrence will be solicited from these agencies during the public notice period for the Program.

Section IV. Compliance Monitoring

The SDDENR will operate a timely and effective compliance monitoring system utilizing PCS to track compliance of permittees with permit conditions. For purposes of this AGREEMENT, the term "compliance monitoring" shall refer to all efforts associated with assuring full compliance with permit conditions and pretreatment requirements. Compliance monitoring shall normally focus first on major dischargers in accordance with the priorities and time frames for compliance tracking as established in the AGREEMENT and as further delineated in the SEA. All compliance monitoring activities shall be undertaken in such a manner that if the situation requires, they will lead to timely, appropriate, and effective enforcement actions as outlined in Section V.

A. Schedule Dates

The SDDENR will track the submittal of all reports on date-related permit conditions or other schedules in effect pursuant to the permit (i.e., Administrative Orders, Compliance Schedule Letters, or Court Orders, etc.). In order to determine the permittee's compliance status, the SDDENR will conduct a timely and substantive review of all date-related permit conditions and reports and consider possible enforcement actions for failure to submit required reports.

B. Review of Self-Monitoring Reports

1. The SDDENR will operate a tracking system utilizing PCS to determine if:
 - a. The required self-monitoring reports are submitted on time;

- b. The submitted reports are complete and on approved forms; and
 - c. The permit conditions and pretreatment requirements are met.
2. The SDDENR will conduct a review of self-monitoring reports received, and will evaluate the permittee's compliance status. This evaluation will take into account frequency, severity, and analytical error in determining where limitations have been exceeded.
 3. The SDDENR will ensure that monitoring data are entered into PCS.
 4. EPA may object in writing to deficiencies in reporting forms used by permittees or the SDDENR. The SDDENR will ensure that deficiencies identified by the WATER MANAGEMENT DIVISION DIRECTOR are adequately addressed.

C. Facility Inspections

1. General Procedures

The SDDENR and EPA will develop as part of the annual State Inspection Plan an annual list of permittees to be the subject of various types of compliance inspections. EPA will be given adequate notice and opportunity to participate in inspections performed by the SDDENR for any discharger for which EPA has requested such prior notice. EPA may also elect to participate with the SDDENR in an inspection at any time for overview purposes. EPA or the SDDENR may determine that additional inspections are necessary to monitor compliance with issued permits. If EPA makes a determination that additional inspections are necessary or appropriate, it shall notify the SDDENR of such determination and may perform the inspection alone (only if SDDENR declines to participate) or jointly with the SDDENR, or may request the SDDENR to conduct those inspections. In cases where the SDDENR chooses not to conduct such additional inspections or participate in the EPA inspections, EPA will keep the SDDENR fully informed of its plans to carry out such inspections and furnish copies of the inspection report to the SDDENR. All inspections will be conducted in accordance with EPA's *NPDES Compliance Inspection Manual*, 1988.

2. Federal Facility Procedures

Because of its responsibilities regarding Federal facilities and the need for continued and periodic coordination with the Office of Management and Budget, EPA reserves the right to inspect Federal facilities at any time. However, EPA will notify and allow opportunity for the SDDENR to attend planned federal facilities inspections.

3. Reporting Schedule

Reports of all inspections conducted by the SDDENR will be forwarded to EPA within sixty (60) days of the date of the inspection. When an inspection is conducted solely by EPA, a copy will be forwarded to the SDDENR within sixty (60) days after the inspection. Each report will be reviewed by the SDDENR to determine what, if any, enforcement action (as outlined in Section V of the AGREEMENT) shall be initiated. All State inspections will be entered into PCS within 60 days of the inspection.

D. Miscellaneous Compliance Activities

1. Independent Inspections Capability

The SDDENR shall have inspection and surveillance procedures and capability to identify compliance or non-compliance independent of permittee supplied information.

2. Information Requests

Whenever either party requests information concerning a specific discharger for a specific reason and the requested information is available from the files, that information will be provided within a reasonable time. If the required information is not available, the agency making the request shall be promptly notified.

3. Emergency Pollution Incidents

Upon receipt of any information of actual or threatened pollution incidents that may result in endangerment to human health and/or environmental damage, the party in receipt of such information shall immediately notify by telephone the other party to this AGREEMENT of the incident. The SDDENR may be notified by contacting the Emergency Response Coordinator at (605) 773-3231. EPA may be notified by telephone at (303) 293-1788.

Section V. Enforcement

A. Enforcement Responsibility - General

1. The SDDENR is responsible for implementing the SWDS compliance and enforcement procedures found in the Program Description and the State Enforcement Management System (EMS).
2. The SDDENR is responsible for taking timely and appropriate enforcement action against permittees in violation of compliance schedules, effluent limitations, pretreatment standards and requirements, and all other permit conditions. This responsibility encompasses violations whether detected by SDDENR or EPA compliance monitoring and inspections.
3. EPA is responsible for providing oversight of SDDENR enforcement activity and to initiate direct federal enforcement where appropriate.

B. Enforcement Agreement

1. The SDDENR and EPA will develop and implement an Enforcement Agreement to clearly define the STATE/FEDERAL relationship in SWDS enforcement.
2. The Enforcement Agreement will address the following:
 - a. noncompliance consultation and coordination
 - b. reporting
 - c. civil penalty policies
 - d. state consent agreements and individual referrals
 - e. direct EPA enforcement actions
 - f. State Attorney General involvement
 - g. federal facilities
 - h. pretreatment

- i. administrative enforcement policies
 - j. criminal enforcement
 - k. EPA oversight criteria for timely and appropriate actions
 - l. other items of mutual concern
3. The Enforcement Agreement will be considered by reference, a part of this NPDES Memorandum of Agreement.
 4. The Enforcement Agreement will be reviewed annually and revised as necessary.

Section VI. Pretreatment

This section defines the SDDENR and EPA responsibilities in carrying out the establishment, implementation and enforcement of the National Pretreatment Program under Section 307, and 402(b) of the CWA.

A. Basic Program

1. The SDDENR has the primary responsibility for ensuring:
 - a. Enforcement of prohibited discharges and categorical standards under the National Pretreatment Standards (NPS) by (40 CFR 403.5 and 40 CFR 403.6);
 - b. Application and enforcement of NPS established by the ADMINISTRATOR in accordance with section 307 (b) and (c) of the Act, local Publicly Owned Treatment Works (POTW) limitations and State standards;
 - c. Review, approval or denial of POTW Pretreatment Programs in accordance with the procedures discussed in 40 CFR 403.8, 403.9, and 403.11;
 - d. Requiring a Pretreatment Program in NPDES Permits issued to POTWs as required in 40 CFR 403.8, and as provided in section 402 (b)(8) of the Act;
 - e. Requiring POTWs to develop and enforce local limits as set forth in 40 CFR 403.5(c);
 - f. Review and, as appropriate, approval of POTW requests for authority to modify categorical Pretreatment Standards to reflect removal of pollutants by a POTW in accordance with 40 CFR 403.7, 403.9 and 403.11 and enforcing related conditions in the POTW's NPDES permit;
 - g. Overseeing POTW Pretreatment Programs to insure compliance with requirements specified in 40 CFR 403.8, and in the POTW's NPDES permit;
 - h. Requiring industrial reports as outlined in 40 CFR 403.12.
2. The SDDENR shall carry out independent inspection, surveillance, and monitoring procedures which will determine compliance or noncompliance by the POTW with pretreatment conditions incorporated into their permit. The SDDENR will also carry out inspection, surveillance, and monitoring procedures which will determine whether each Industrial User (IU) is in compliance with the National Pretreatment Standards (NPS).

3. The SDDENR will issue, reissue, or modify permits according to the procedures outlined in Section III of this AGREEMENT.
4. Upon request, copies of notices received by the SDDENR from POTW's that relate to new introduction of pollutants, or substantial changes in the volume or character of pollutants will be provided to EPA.
5. EPA will oversee SDDENR pretreatment operations in accordance with 40 CFR 403, including conducting PCIs and audits, requiring annual reports from approved programs, and developing program policy and strategy.
6. SDDENR retains ultimate authority and responsibility for implementing all POTW pretreatment program requirements and is responsible for oversight on those state-run program activities carried out by POTWs and as specified in the joint powers agreement. EPA will oversee the SDDENR's activities specified in the agreement. The joint powers agreement must, at a minimum, contain all the elements listed at 40 CFR 403.8(f) and EPA, Region VII, will be given the opportunity to review and comment on each joint powers agreement before it is concluded.
7. Nothing in this agreement is intended to affect any pretreatment requirement including any standards or prohibitions established by State or local law, as long as the State or local requirements are not less stringent than any set forth in the National Pretreatment Program, or other requirements or prohibitions established under the CWA or Federal regulations.

B. Section 403.6 NPS Categorical Standards

The SDDENR shall review requests from IU's for industrial subcategory determinations received within thirty (30) days after the effective date of an NPS for a subcategory under which an IU believes itself to be included and prepare a written determination and justification as to whether the IU does or does not fall within the particular subcategory. The SDDENR shall forward its findings together with a copy of the request and necessary supporting information to the EPA Region VIII, NPDES Branch. If EPA does not object to the SDDENR's decision within sixty (60) days after receipt thereof, the SDDENR's finding is final.

C. Section 403.7 Categorical NPS Credit Removal and Section 403.9 POTW Pretreatment Program Approvals

The SDDENR shall review POTW applications to revise discharge limits for users who are or may be subject in the future to categorical NPS and review requests for approval of POTW Pretreatment Programs. The SDDENR's findings together with the complete application and supporting information shall be submitted to Region VIII EPA NPDES Branch for review. No POTW Pretreatment Program or request for revised discharge limits shall be approved by the SDDENR if following the thirty (30) day (or extended) evaluation period provided for in 40 CFR 403.11 (b)(1)(ii), EPA, Regional Water Management Division Director, objects in writing to approval of such submission.

D. Section 403.13 Variance from Categorical National Pretreatment Standards (NPS) for Fundamentally Different Factors (FDF)

The SDDENR will make an initial finding on all requests from IU's for variances from categorical NPS for FDF, and in cases where SDDENR finds that FDF do not exist, the

SDDENR will deny the request and notify the POTW of the denial. Where the SDDENR supports the variance, the SDDENR will submit its findings together with the request and supporting information to EPA, NPDES Branch, for a final review. Where the Administrator finds that FDF do not exist, he shall deny the request and send a copy of his determination to the Secretary the POTW, and to the requester. Where the Administrator finds that FDF do exist and that partial or full variance is justified, he will approve the variance. In approving the variance the Administrator will do the activities listed at 40 CFR 403.13(1)(2).

E. Net/Gross Adjustments to Categorical Standards

If the SDDENR receives a request for a net/gross adjustment of applicable categorical standards in accordance with 40 CFR 403.15, the SDDENR shall forward the application to the Water Management Division Director for a determination. Once this determination has been made the Water Management Division Director shall notify the applicant and the applicant's POTW and provide reasons for the determination and any additional monitoring requirements the Water Management Division Director deems necessary, in writing.

F. Miscellaneous

The SDDENR will submit to the Water Management Division Director a list of POTWs which are required to develop their own pretreatment program or are under investigation by the SDDENR for the possible need of a local pretreatment program. The State will document its reasons for all deletions from the list. Before deleting any POTW with a design flow greater than 5 MGD, the SDDENR will obtain an industrial survey from the POTW and determine (1) that the POTW is not experiencing pass through or interference problems, (2) there are no industrial users of the POTW subject to categorical standards or specific limits developed pursuant to 40 CFR 403.5(c). The State will document all such determinations and provide copies to EPA. For deletions of POTWs with flows less than 5 MGD, the SDDENR will first determine (with appropriate documentation) that the POTW is not experiencing treatment process upsets, violations of POTW effluent limitations, or contamination of municipal sludge due to industrial users. The SDDENR will also maintain documentation on the total design flow and nature and amount of industrial wastes received by the POTW.

The SDDENR and EPA will communicate, through the §106 planning process, commitments and priorities for program implementation including commitments for inspection of POTWs and industrial users. The SEA will contain, at a minimum, a list of permits to be issued by the SDDENR to POTWs and industrial users subject to pretreatment requirements; and the annual inspection plan will include a list of POTWs and industrial users to be audited and inspected.

Section VII. Reporting and Transmittal of Information

Reporting and transmittal of information shall be according to the following schedule:

A. SDDENR to EPA

Description

Frequency of Submission

1. A copy of all complete permit applications received by the SDDENR. As received but no later than (30) days
2. A copy or listing of all public notices and proposed permits and Statements of Basis for permits not waived. No later than the time of public notice
3. A copy of all final permits (including general permits) and final Statements of Basis which have had changes made to any original draft sent to EPA for permits not waived. When drafted
4. One copy of all issued permits and documentation which is related to or affects authorization of the permit. As issued
5. Copies of all compliance inspection reports. 60 days after conducted
6. For all minor SWD permittees a statistical summary shall be prepared indicating number of minor permits reviewed, number of significant noncompliance, number of enforcement actions and number of compliance deadline extensions. The summary shall list noncompliance according to the following categories:
 - a. Failure to complete construction
 - b. Failure to submit scheduled report
 - c. Significant noncompliance with effluent limits
 - d. Failure to report effluent data
 - e. Deficient reports.
 Annually within 60 days following the end of the Federal fiscal year (September 30)
7. Copies of all of the following enforcement actions against major discharge violators of permit conditions and pretreatment requirements: As issued
 - a. All correspondence to and from major permittees regarding SWD noncompliance
 - b. Administrative Orders
 - c. Initial Determinations
 - d. Processing for Judicial Action
 - e. Consent Decrees
 - f. Assessment of Penalties
 - g. Federal Facilities Compliance Agreements

8.	For all dischargers, a summary list of the enforcement actions shown in item 7 including information identifying permit number, permittee name, type of action and date of action.	Quarterly
9.	Copies of the following correspondence, required by Section VI of this AGREEMENT to carry out the Pretreatment Program:	Within 15 days of closing date for receipt of comments
	a. Notices of introduction of new pollutants under Section VI.A.4.	
	b. Categorical pretreatment determination made under Section VI.B.	
	c. Pretreatment limit determination under Section VI.C.	
	d. Initial determinations on pretreatment FDF under Section VI.D.	
	e. Copies of POTW Pretreatment Programs approved by the SECRETARY	Upon date of approval
10.	Copies of significant comments presented on the proposed permits, unless permit review has been waived under Section III.C.	Within 15 days of closing for receipt of comments
11.	Copies of all pretreatment annual reports.	Within 30 days of receipt
12.	Quarterly Noncompliance Report (QNCR) per 40 CFR 123.45	Feb 28, May 31, Aug 31, Nov 30
13.	All required data input to PCS	In accordance with EMS
14.	Annual inspection plan Including - A list of major compliance inspections - The procedure for revising the schedule - Reporting on inspection plan status - A list of EPA oversight inspections	June 1
15.	Written response to EPA NOV's	Within 30 days of receipt
16.	NPDES permit information via PCS	Monthly
B.	<u>EPA to SDDENR</u>	
	<u>Description</u>	<u>Frequency of Submission</u>
1.	Revisions to the schedule of compliance	As needed

inspections

2. Copies of all EPA completed compliance inspection reports and data
Within 30 days if samples not collected. Within 45 days if samples are collected, unless radiological samples are collected, in which case 60 days are allowed for submission
3. Notification of citizen complaints where a citizen does not agree to contact the SDDENR directly.
Immediately
4. Notification to the SDDENR of observed violations resulting from EPA oversight inspections which do not qualify as compliance inspections.
Immediately
5. Issue Notice of Violation (NOV) to the SDDENR for EPA observed violations
Within 30 days of violation
6. Notification of the commencement of Federal enforcement and the actions being taken
Fourteen (14) days prior to date action is to be initiated
7. An analysis of the SWD program operation based on SDDENR reports, meetings with SDDENR officials, and file audits.
Established in SEA
8. Provide on-site PCS training to SDDENR personnel
As needed and as available
9. Assistance in obtaining PCS retrievals and prompt notice of change in PCS procedures.
As needed and as available
10. Copies of court decisions/actions affecting the permit issuance, compliance and enforcement process, regulatory changes and proposed changes, and policy or guidance memorandum.
Within 15 days of action

The permit issuing authority shall transmit a copy of every issued NPDES or SWD permit to each affected State or Indian Tribe no later than 30 days after its issuance.

Section VIII. Program Review

EPA is responsible for reviewing the South Dakota's SWDS program is consistent with all requirements of this AGREEMENT, the SEA, and applicable sections of 40 CFR Parts 122 through 125 and Part 140. This review is accomplished in three major components. First, formal program reviews and audits to identify any major program deficiencies and needed corrective actions. Second, continuous review of SDDENR permit, compliance and enforcement actions on major permittees is conducted which may result in EPA permit vetoes and direct EPA enforcement actions. Third, quarterly review of annual commitments in the SEA is conducted to evaluate progress and to resolve program implementation issues. To fulfill this responsibility, EPA shall:

1. Review the information transmitted from the SDDENR to assure that all requirements of Section VII of this AGREEMENT are met.
2. Meet with SDDENR officials to observe the data handling, permit processing, compliance monitoring, and enforcement procedures, including both manual and automated data processing.
3. Examine in detail the SDDENR files and documentation of selected facilities to determine whether:
 - a. Permits are processed and issued consistently with Federal requirements;
 - b. Ready capability exists to discover permit violations;
 - c. Compliance reviews are timely;
 - d. Selection of enforcement actions is appropriate;
 - e. Enforcement actions are both timely and effective.These detailed file audits shall be conducted by EPA in the SDDENR office semiannually during the first two years of the agreement and annually thereafter. The SDDENR shall be notified 30 days in advance of the audit so that appropriate SDDENR officials may be available to discuss individual circumstances and problems with EPA. A copy of the audit report shall be transmitted to the SDDENR within forty-five (45) days of completion of the audit.
4. Conduct oversight inspections to evaluate the SDDENR compliance inspection program.
5. Review the SDDENR's public participation policies, practices, and procedures.
6. Identify program deficiencies. In the event EPA determines that elements of SWD are in any way deficient or inconsistent with this AGREEMENT, the SEA, applicable regulations, and statutes, EPA shall notify the SDDENR in writing of these inconsistencies or other deficiencies. The SDDENR shall respond in writing within thirty (30) days. EPA shall inform the SDDENR in writing, within thirty (30) days of its determination, whether noted inconsistencies or deficiencies have been rectified. If they have not been corrected, EPA may proceed in accordance with Section 309 and 402(c)(3) of the CWA. In accordance with 40 CFR 123.62, these requirements do not preclude the State from notifying EPA of any proposed modifications.
7. Determine the need for (and to hold) public hearings on SWD. Threshold criteria for determining the need for a public hearing include:
 - a. Programmatic
 - (1) Permit issuance backlog in excess of 10% of the total permittees.
 - (2) Deficient permits as expressed by EPA formal objections and/or vetoes of proposed permits.
 - (3) Inspection coverage below regulatory requirements.

- (4) Continued high rates of noncompliance (i.e. significantly above regional and national averages).
- (5) Failure to meet criteria established in the Enforcement Agreement.
- b. Legal
The State legal authorities must be consistent with EPA's minimum requirements at all times. This includes statutory or regulatory provisions or judicial decisions that may limit the scope of State law.
- c. Resources
Resource problems include inadequate funding and personnel problems. Programmatic problems are often due, in part, to lack of adequate resources and/or expertise. The SDDENR is expected to maintain the level of resources and kinds of personnel presented in the Description of State Program.

These criteria are in addition to but not exclusive of requirements in 40 CFR 123.63.

The SDDENR shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its SWD forms and SWD program procedures and shall transmit the text of any such change or new form.

The SDDENR shall obtain EPA approval before approving test methods other than those specified in the NPDES regulations. EPA either approve or deny the request within a reasonable timeframe.

Nothing in this AGREEMENT shall be construed to limit EPA authority to take action under Section 308, 309, 311, 402, 504, or other sections of the CWA.

Nothing in this AGREEMENT shall be construed to require the SDDENR to take action which is not authorized by State law.

Section IX. Miscellaneous Provisions

- A. The SDDENR will comply with the conflict of interest provisions contained in Section 304(h)2 of the CWA.
- B. The SDDENR will have two years to make statutory changes necessary to conform with federal program changes. The SDDENR will not be required to update its Surface Water Discharge (SWD) and Pretreatment regulations more often than once per year in order to comply with EPA NPDES regulations promulgated subsequent to SDDENR assumption of the program.

Section X. Schedule of Assumption of NPDES Activities by the State of South Dakota

NPDES activities will be assumed by the SDDENR according to the following schedule:

		<u>Date of Assumption</u>
1.	NPDES	
	a. SWD activities for all POTWs and privately owned domestic wastewater treatment facilities for which applications are received subsequent	Upon approval of SWD program

to effective date of approval of SWD program and which are not included in items c and d below.

- | | | |
|----|--|---|
| b. | SWD activities for all industrial commercial, mining, silvicultural, animal feeding operation, aquatic animal production facilities and agriculture projects for which applications are received subsequent to SWD program approval and which are not included in items c and d below. | Upon approval of SWD program |
| c. | Permitting activities for all permits which have EPA enforcement actions existing at time of SWD program | Permits to be transferred to State upon completion of EPA action |
| d. | Municipal and industrial permit applications received by EPA prior to approval and permits for which there is an existing request for modification or variance at the time of approval of the SWDS. | Permits to be transferred to State jurisdiction within (30) days of (1) effective date of EPA approval of modification/variance |
| 2. | SWD activities for Federal facilities | Upon approval of SWD program |
| 3. | General Permits | Upon approval of SWD program |
| 4. | Direct implementation of PCS | Upon approval of SWD program |
| 5. | Pretreatment | Upon approval of the Pretreatment program |
| 6. | Adoption of State Enforcement Management system (EMS) | Upon approval of SWD program |
| 7. | Adoption of the State/EPA NPDES Enforcement Agreement. | Upon approval of SWD program |

Section XI. Computation of Time

- A. In computing any period of time prescribed by this MOA the day from which the designated period to time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which case the period extends until the end of the next day which is not a Saturday, Sunday or a legal holiday. When the period of time is less than seven days, intermediate Saturdays,

Sundays, or legal holidays shall be excluded in the computation.

- B. For the purpose of EPA review of permit applications, proposed permits, or permit modifications, the period for review shall not commence until received by EPA.

Section XII. Modification

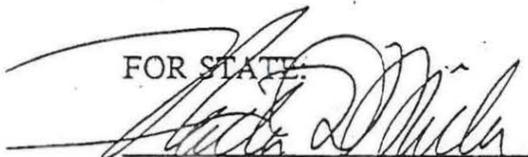
This MOA shall take effect immediately upon approval by the Regional Administrator, Either the Secretary or EPA may initiate action to modify this MOA at any time. If EPA or the Administrator of EPA determines that any modification to the MOA initiated by the Secretary does not conform to the requirements of §402(b) of the CWA, or to the requirements of 40 CFR Parts 122-125 or any other applicable Federal regulation, as amended, the Regional Administrator or Administrator of EPA shall notify the SDDENR in writing of any proposed revision, or modifications which must be in this agreement. Any proposed amendments or revisions must be put in writing and signed by the Secretary and the Regional Administrator, with the prior concurrence of the Director, EPA Office of Water Enforcement and Permits and EPA Associate General Counsel for Water.

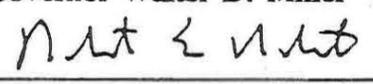
Section XIII. Approval and Effective Date of Agreement

This Memorandum of Agreement shall take effect upon approval by the Administrator of the Environmental Protection Agency.

In witness whereof, the parties execute this agreement.

FOR STATE:


Governor Walter D. Miller


Robert E. Roberts, Secretary
South Dakota Department of
Environment and Natural Resources

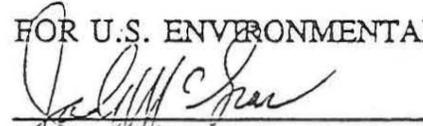
8/30/93

(Date)

9/1/93

(Date)

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:


Jack McGraw, Acting Regional Administrator
EPA, Region VIII

12/30/93

(Date)

ADDENDUM TO
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

The following items are added to the Memorandum of Agreement:

1. The following sentence is added to Section III.E.4.: "The process used for investigating and responding to unsigned complaints will be public noticed in major newspapers in the State of South Dakota and will be prominently posted in the main office and field office of the SDDENR."
2. The following sentence is added to Section II.A.13.: "Individual members of the general public and nonprofit organizations shall not be required to be represented by attorneys in contested case proceedings to the extent allowed by the State Bar Association and Supreme Court."

This Addendum shall take effect upon approval by the Regional Administrator; Environmental Protection Agency, Region VIII.

In witness whereof, the parties execute this agreement.

FOR STATE:



Russell L. Stone, Acting Secretary
South Dakota Department of
Environment and Natural Resources

12/27/93
(Date)

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:



Jack McGraw, Acting Regional Administrator
EPA, Region VIII

12/30/93
(Date)

**COOPERATIVE ENFORCEMENT AGREEMENT
BETWEEN THE
SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
AND THE
U.S. ENVIRONMENTAL PROTECTION AGENCY**

I. PURPOSE AND SCOPE

The purpose of this agreement is to (1) establish and provide for the coordination and consultation on State and EPA enforcement activities, and (2) define the basic oversight criteria for timely and appropriate enforcement actions by the State. It is understood that the State has primary responsibility for the Surface Water Discharge System (SWDS) compliance and enforcement actions in South Dakota. It is further understood that this agreement does not limit EPA's enforcement authority [CWA § 402 (i)] and EPA has certain oversight responsibilities with respect to these activities, but the degree of oversight conducted by EPA shall be subject to modification on the basis of the performance of the State's SWDS enforcement program.

II. NONCOMPLIANCE CONSULTATION AND COORDINATION

The State reviews all appropriate compliance information from all permittees, and prepares and submits to EPA the Quarterly Noncompliance Report (QNCR). As an additional oversight provision, EPA, Region VIII, reviews selected compliance information. When appropriate, EPA will notify the State by telephone where significant noncompliance (SNC) is found along with all documentation EPA has regarding the noncompliance, i.e., inspection reports, monitoring data, etc. EPA will ensure that the State has had ample opportunity to initiate the appropriate enforcement response prior to its notification action. If the State does not initiate appropriate and timely action, EPA will then send a Notice of Violation (NOV) to the State and the discharger. State response to the NOV will be sent to EPA in writing within 30 days of receipt.

EPA and State compliance staff will coordinate related enforcement activities as necessary to ensure the most efficient and effective State and Federal compliance actions. It is not implied by this agreement that State actions need prior concurrence by EPA, but that a certain level of communication should take place in the course of enforcement actions covered by the MOA, and this agreement.

The State shall submit QNCRs to EPA by August 31, November 30, February 28, and May 31 of each year in accordance with 40 CFR 123.45. Also, the State shall submit by October 5, January 5, April 5, and July 5 of each year a list of all formal enforcement actions taken during the quarter. State formal enforcement actions are defined as notices of violations and orders, civil referrals to the State Attorney General, consent agreements filed in State court, formal administrative agreements, and criminal referrals to appropriate county attorney or the

State Attorney General. The State shall maintain a record of all penalties assessed as well as those collected.

For non judicial actions to be considered formal, they shall be documents which, when applicable:

- a) Identify the specific violation(s) and the basis for the enforcement action;
- b) Require action to expeditiously achieve compliance (with legal authorities or conditions of the permit);
- c) Specify a timetable for return to compliance;
- d) Contain consequences for noncompliance that are independently enforceable without having to prove the original violation; and
- e) Subject the discharger to adverse legal consequences for noncompliance.

III. CIVIL PENALTIES

The State shall request settlement of its legal claim for civil penalties in accordance with its civil penalty guidance policy. The guidance policy considers such factors as the economic benefit of noncompliance, the seriousness of the violations, the number of violations, the environmental harm done, and the recalcitrance of the violator. The policy acknowledges that costs incurred in returning to compliance are not part of the penalty. All penalty assessments on major permitted dischargers shall be documented on a penalty calculation worksheet. If such a settlement offer is not accepted by the violator, the case shall be referred to the Attorney General for enforcement action.

IV. CREATIVE SETTLEMENTS

Pollution prevention and waste minimization may be considered in case settlements. However, such approaches are not to compromise the deterrence value of the case. Environmental audits may be used.

V. STATE CONSENT AGREEMENT AND JUDICIAL REFERRALS

The State shall consult and coordinate with EPA on all major permitted discharger consent and settlement agreement negotiations and judicial referral preparations under the SWDS. Specifically, the State shall provide EPA a draft copy of the consent agreement before signing and the judicial referral before filing for review and comment. These documents shall be submitted to the Chief of the Enforcement Section for review for a minimum of five working days. Included in the transmittal shall be a summary of the violations and the penalty calculations used to determine the proposed penalty.

To ensure that State actions are not unduly delayed by EPA review, the State must assume EPA's concurrence if comments are not received within the specified time frame. Prior to EPA initiating inspections of any facility with which the State is in negotiation, EPA will consult with the State and take into consideration any detrimental effects of the inspection on the negotiations.

VI. EPA ENFORCEMENT ACTIONS

EPA shall consult and coordinate with the State on all direct enforcement actions it considers in the State. EPA will consider Federal enforcement action only when any of the following situations exist:

- the State requests EPA direct enforcement,
- a violation of an EPA administrative order or consent decree occurs,
- a legal precedent under national environmental laws is present,
- when necessary to ensure the viability of a national initiative (example: National Municipal Policy),
- unresolved interstate issues are present,
- the State fails to address all appropriate violations,
- the State fails to initiate a timely and appropriate enforcement action, or
- where the State has obtained a grossly deficient penalty or sanction under the circumstances of the violations.

Any enforcement related public notice, news release or other public announcement from Region VIII which relates to a regulation and/or a discharger for which the State has primary enforcement responsibility or for which EPA has the enforcement lead, shall be provided to and discussed with the State prior to release by Region VIII. In such cases, the State shall be provided with the opportunity to be present at all press conferences or public meetings where Region VIII press releases are to be discussed.

Where EPA is involved in active litigation with a permittee, EPA will provide as much advance notice to the State as possible prior to inspecting the permittee's facility, which notice shall be at least five (5) working days, except under unusual circumstances (e.g., report of an unauthorized activity where immediate inspection is necessary).

Where EPA takes the lead on a case and decides that an administrative penalty will be sought, EPA will consult by telephone with the State concerning its intended course of

action. EPA will provide the State with a draft of the proposed penalty order for review prior to sending it to the discharger. Included in the transmittal shall be summary of the violations and the penalty calculations used to determine the proposed penalty. A minimum of five (5) working days shall be provided for review.

VII. ATTORNEY GENERAL INVOLVEMENT

It will be the responsibility of the Division of Environmental Regulation to keep the State Attorney General informed of planned EPA direct enforcement actions. A line of communication shall be established between EPA and the Division of Environmental Regulation on anticipated EPA enforcement actions.

VIII. MULTI-MEDIA ENFORCEMENT

A. Multi-Media Enforcement Defined

Multi-Media enforcement shall mean one or all of the following:

- multi-media inspections;
- multi-media targeting of enforcement resources to address specific geographic areas, pollutants of concern, industries, companies or facilities with poor compliance histories across programs;
- settlement conditions with multi-media benefits; and
- multi-media cases, i.e. those with multi-media counts.

These approaches can provide opportunities for: 1) greater environmental results, pollution prevention and/or risk reduction, 2) greater deterrence, and/or 3) greater resource efficiencies by using a single case to accomplish broader enforcement and environmental results.

Multi-media enforcement approaches are intended to supplement rather than supplant single program approaches. Priorities must remain the protection of the public health and the environment, whether it is best accomplished through single or multi-media enforcement activities.

The State is strongly encouraged to assist and participate, when and where appropriate, with EPA multi-media enforcement initiatives. EPA will endeavor to build State capacity (i.e. access to the IDEA system, training, consultation) for multi-media enforcement and remove barriers to multi-media enforcement, where appropriate.

B. Multi-Media Timely and Appropriate Enforcement Response

Multi-media enforcement will be a factor taken into account in assessing State performance in individual cases as to whether timely and appropriate enforcement response is being pursued. This recognizes that multi-media enforcement may in some cases slow the process of initiating formal enforcement actions, and that the statutes of limitations involved may prohibit such time delay.

When a multi-media enforcement action may take a longer time to develop than if it were pursued as a single-media case, a case-specific schedule, agreed to by both parties, will be used to establish timely and appropriate Multi-media milestones.

IX. FEDERAL FACILITIES

Federal facilities will be treated under this agreement in the same manner as non-federal permittees. EPA will be notified of State enforcement action against Federal Facilities. In March of each year, the Federal Facilities Coordinator will send to the State the A-106 list of Federal facility pollution control projects for review and comment regarding necessary water pollution control projects.

X. PRETREATMENT

The State shall be responsible for pretreatment actions to the same degree and extent as any other SWDS violation.

XI. TIMELINESS AND APPROPRIATENESS OF STATE ENFORCEMENT ACTIONS

The following enforcement response guidelines will be followed:

A. Timeliness

1. The State will evaluate instances of non-compliance by major permittees and P.L. 92-500 minor permittees within 30 days of from the identification of a violation, determine the appropriate response, and document any action taken/not taken (including the technical reasons).
2. In the case of major permittees, the State is expected to have already initiated measures which may include a formal enforcement action to achieve compliance by the time the permittee appears on the QNCR.
3. Prior to a permittee appearing on the subsequent QNCR for the same violation, the permittee should either be in compliance or the State should have taken formal enforcement action to achieve final compliance.

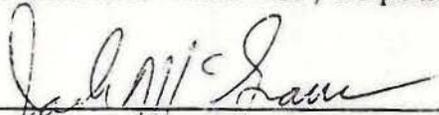
B. Appropriateness

1. Formal enforcement action should be the response to significant noncompliance listed on the QNCR.
2. A judicial referral should be considered where:
 - a. An administrative order has been violated,
 - b. The violation must be stopped immediately,
 - c. Long term compliance must be compelled,
 - d. A substantial economic benefit has been obtained from the noncompliance, or
 - e. A deterrent is needed to prevent others from similarly violating the law.
3. A monetary penalty should be part of each judicial referral or consent agreement.
4. The amount of the penalty to be obtained will be reviewed by EPA countermeasures with one calculated by using EPA's Clean Water Act Civil Penalty Policy. Should EPA determine that any State penalty settlement is grossly deficient, EPA will consult with the State prior to initiating any EPA penalty recovery action and provide to the State a full disclosure of criteria utilized in making such determination.

XII. MODIFICATION

This enforcement agreement shall take effect immediately upon signature by both parties. This agreement or future modified versions of it shall remain in effect as a portion of the NPDES Memorandum of Agreement (Section V.B. of the MOA). Either Party may initiate action to modify the agreement at any time. Proposed amendments or revisions will be submitted in writing to the other party by the signatory to this agreement. Formal response to the proposed modifications will be made within 30 days. If agreement on the revisions cannot be reached within a reasonable time, the agreement can be unilaterally terminated.

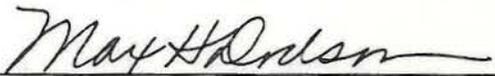
IN WITNESS WHEREOF, the parties have executed this Agreement.



Jack McGraw
Acting Regional Administrator
EPA, Region VIII



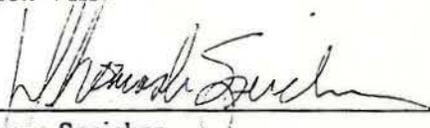
Robert E. Roberts, Secretary
South Dakota Department of Environment
and Natural Resources



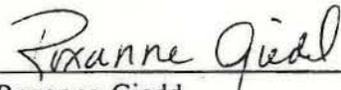
Max H. Dodson, Director
Water Management Division
Region VIII



Steven M. Pirner, Director
Division of Environmental Regulation



Thomas Speicher
Regional Counsel



Roxanne Giedd
Assistant Attorney General

12/30/93
Dated

3/31/93
Dated



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

OCT 22 2001

8P-W-P

Honorable William J. Janklow
Governor, State of South Dakota
Executive Office, State Capitol Building
500 East Capitol
Pierre, South Dakota 57501-5070

Dear Governor Janklow:

I am pleased to inform you that the United States Environmental Protection Agency (EPA) has approved the State of South Dakota's request to modify the South Dakota Pollutant Discharge Elimination System Program to include administration of the sludge management program, pursuant to Sections 402 and 405 of the Clean Water Act, 33 U.S.C. Sections 1342 and 1345, and 40 CFR Parts 123 and 501.

My staff has reviewed South Dakota's request for completeness and adequacy and has found that it meets the requirements for the EPA's approval of state sludge management programs. My staff also has discussed the application with the South Dakota Office of the U.S. Fish and Wildlife Service (FWS). On June 29, 2000, the FWS concurred with the EPA's conclusion that EPA's decision to approve South Dakota's sludge management program was not likely either to jeopardize the continued existence of any species listed as endangered or threatened under the federal Endangered Species Act or to result in the destruction or adverse modification of any designated critical habitat of these species. Additionally, South Dakota's State Historic Preservation Officer has determined that no historic properties would be affected by the EPA's approval of the State's sludge management program.

The EPA has published announcements of its intention to approve South Dakota's proposed sludge management program in the Federal Register and in two of South Dakota's newspapers. The EPA has also mailed notices to persons who may be interested in this action. In these announcements and notices, the EPA requested comments from the public regarding the proposed program approval. No comments were received. The EPA will soon publish a notice in the Federal Register announcing its final approval of this program.



I have signed the Addendum to the Memorandum of Agreement between the U.S. Environmental Protection Agency and the State of South Dakota. Please note that this Addendum supplements and does not replace the Memorandum of Agreement relating to the underlying National Pollutant Discharge Elimination System, which was signed on behalf of South Dakota in 1993.

I look forward to South Dakota's effective implementation of the sludge management program. Please accept my congratulations.

Sincerely,



Jack W. McGraw

js Acting Regional Administrator

cc: Steven Pirner, Secretary, DENR

**ADDENDUM
TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
TO INCORPORATE AGREEMENT CONCERNING SLUDGE USE AND DISPOSAL**

This agreement is an Addendum to a Memorandum of Agreement between the State of South Dakota (State) and the Regional Administrator for Region VIII of the U.S. Environmental Protection Agency (EPA) which was signed by Governor Walter D. Miller on August 30, 1993. The purpose of this Addendum is to define the responsibilities of EPA and the State for establishing, implementing, and enforcing the State's Sludge Management Program in accordance with regulations promulgated under sections 402 and 405 of the Clean Water Act, 33 U.S.C. Sections 1342 and 1345, and as described in the State's Program Description submitted to EPA on August 12, 1998.

Section I. General

1. Nothing in this Addendum should be interpreted to restrict EPA's oversight responsibility or authority for all aspects of the State's Sludge Management Program.
2. This Addendum shall become effective when approved by the both the State and the EPA.
3. Nothing in this Addendum shall limit or relieve the parties of responsibilities established by the MOA to which this is an addendum.
4. The State and EPA will negotiate priorities for implementation of a Sludge Management Program and inspection of POTWs and other sludge users and disposers.
5. The State's noncompliance with any of the terms in this Addendum is grounds for withdrawal of EPA approval of the State's Sludge Management Program.

6. This Addendum pertains to all permit and other regulatory actions relating to sewage sludge use and disposal in the State, other than those occurring in Indian Country, as that term is defined in 18 U.S.C. Section 1151.

Section II. Transfer of Permit Administration

1. Within 30 days of the effective date of this Addendum, EPA will provide the State with all (a) pending permit applications relating to sewage sludge use or disposal on which EPA has not taken final action, and (b) other information relevant to these applications and to program operations in general, including support files, monitoring reports, compliance reports and previously issued permits.
2. EPA-issued sludge permits currently in effect shall remain in effect after EPA's approval of the State's Sludge Management Program.
3. If a sludge user or disposer is required to obtain a permit from both EPA and the State under different programs, the State and EPA may consolidate processing of permits under written procedures that ensure adequate notice to all affected permittees. The State and EPA may coordinate the expiration dates of new and existing permits so that processing of renewal applications may be consolidated.

Section III. EPA Review and Waiver

1. The State will forward to EPA for review, comment, and objection copies of the following:

- permit applications, draft permits, and Statements of Basis for all Class I facilities (*i.e.*, facilities required to have an approved pretreatment program), all facilities where sludge use or disposal practices may affect another state, and all facilities where toxic pollutants in sludge use and disposal practices may affect public health and the environment facilities, and.

- draft general permits for sewage sludge use or disposal.

EPA shall make comments, objections, or recommendations on draft individual permits during the public comment period. EPA reserves the right to take 90 days to supply specific grounds for objections as provided under 40 CFR Section 123.44. In the case of general permits, EPA shall have 90 days to make comments, objections or recommendations.

2. For all other sludge permit applications, EPA waives review, unless EPA notifies the State otherwise in writing.

Section IV. Reporting

1. Within thirty days of any action that the State takes related to any permit application or to any general permit, the State will notify EPA in writing of that action. This requirement does not apply to any permit for which EPA has waived review.
2. The State will provide EPA with a copy of every permit issued to a Class I sludge management facility. Copies of other final permits issued to other treatment works treating domestic sewage shall be transmitted to the EPA upon EPA's request.
3. The State will address biosolids facility inspections in the annual State/EPA inspection plan in accordance with the schedule outlined in the EPA/State Performance Partnership Agreement.
4. By April 1st of each year the State will review all biosolids annual reports and electronically provide summary data to EPA through the Biosolids Data Management System (BDMS).
5. The State shall provide EPA with annual reports as required by 40 CFR §501.21.

Section V. Enforcement and Compliance Monitoring

The enforcement and compliance monitoring provisions in the MOA shall apply to treatment works treating domestic sewage, to sludge users and disposers, and to sludge use and disposal practices.

Section VI. Program Review

The program review section of the MOA shall apply to the State's sludge management program.

Section VII. Permitting

1. All permits that the State issues for sewage sludge use or disposal will include all permit conditions required by 40 CFR §501.15(b).
2. The State will require all applicants for sewage sludge use or disposal permits to provide all information that 40 CFR §501.15 requires to be included in permit applications.
3. The State will accept signatures of permit applicants as provided by 40 CFR §501.15(b).

4. Because the State considers effluent data to include sewage sludge data the State will not keep sewage sludge data confidential.
5. The State will modify, revoke and reissue, and terminate permits only following written requests to do so and only for those reasons specified in 40 CFR §501.15(c).
6. All draft permits prepared by the State will contain all conditions required by 40 CFR §501.15(d)(3).
7. Upon issuing a final permit, the State will issue a response to comments, which will be available to the public, specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the change, briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any meeting or hearing.

Section VIII. Modification

Either the State or the EPA may initiate action to modify this MOA at any time. If the EPA determines that any modification to the MOA initiated by the State does not conform to the requirements of section 402(b) or 405 of the CWA, the requirements of 40 CFR Parts 122-125 and 501, or any other applicable Federal regulations, as amended, the EPA shall notify the Secretary in writing of any proposed revision or modifications which must be in this agreement. Any proposed amendments or revisions must be made by a written agreement between the Secretary and the EPA Regional Administrator.

Section IX. Incorporation by Reference

The State may adopt any Federal standards or requirements by reference. Unless permissible under State law, the State will not prospectively incorporate regulations by reference.

Section X. Notifications

1. All notifications that the State is to provide EPA under this addendum shall be sent in writing to the following:

Assistant Regional Administrator
Office of Partnerships and Regulatory Assistance
U.S. EPA, Region VIII
999 18th Street, Suite 500
Denver, CO 80202-2466

2. All notifications that the EPA is to provide the State under this addendum shall be sent in writing to the following:

Secretary
Department of Environment and Natural Resources
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181

Section X. Effective Date

This Addendum shall become effective upon signature by both parties. If the parties sign on different dates, the later date shall be the effective date.

FOR THE STATE OF SOUTH DAKOTA:



Steven M. Pirner, Secretary
Department of Environment
and Natural Resources
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181

9/27/01
Date

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY



for Jack W. McGraw
Acting Regional Administrator
EPA Region VIII
999 18th Street, Suite 300
Denver, CO 80202

10/22/01
Date