

III. AIR QUALITY

A. Federal Clean Air Act

The Clean Air Act (CAA)¹⁸ is a comprehensive and complex piece of environmental legislation. The 1990 amendments to the CAA require sources which may cause pollution to obtain operating permits. These permits include a comprehensive statement of the pollution source's CAA obligations regarding emission limits, fee requirements, inspection, monitoring, and reporting duties. Violators are exposed to administrative compliance orders and federal court injunctions.

¹⁸ 42 U.S.C. § 7401 *et seq.* (1994).

Under the 1990 CAA amendments, all criminal penalties are felonies. Fines of up to \$250,000 per day may be imposed on individuals and up to \$500,000 per day for corporations. Prison terms of up to five years may be imposed. Subsequent violations may result in the doubling of sanctions. Knowing endangerment offenses for the release of hazardous air pollutants may subject individuals to fines of up to \$250,000 with jail sentences of up to 15 years, and corporations may be fined up to \$1,000,000.

Negligently releasing hazardous air pollutants can subject the polluter to fines of up to \$250,000 and one year in jail if the polluter knows that the actions will place another person in imminent danger of death or serious bodily injury. Making false statements on reports or tampering with monitoring devices may result in fines up to \$250,000 per day and jail terms of up to two years.

In April of 1994, EPA announced a reward program for citizens who report companies that violate the CAA. Rewards of up to \$10,000 may be awarded to citizens whose information results in a criminal conviction or fine under the CAA.

The overall objective of the CAA is to protect human health, welfare, and the environment by maintaining and improving the quality of the air through the development of standards. Standards controlling ambient air emissions from farming practices like prescribed burning are geographically specific within each State Implementation Plan (SIP). The SIP may also provide visibility standards. Locations which the National Ambient Air Quality Standards designate as air non-attainment areas are subject to more restrictions.

Finally, grain terminal elevators having a permanent storage capacity of more than 2.5 million bushels and grain storage elevators with a permanent storage capacity of more than one million bushels, including their loading and unloading facilities, are governed by regulations controlling discharge of gases and grain loading and unloading emissions.

Currently, the CAA has no application to the problem of odor, which is a common complaint regarding agricultural facilities. Odor problems are handled under state nuisance laws. However, livestock producers must stay informed of changes in the CAA which might affect them in the future. For example, regulations have been proposed which would prohibit dust from remaining in the air beyond the property on which it originates. A strict interpretation of this regulation could subject combining, disking, or other farm and ranch operations to the provisions of the CAA.

Producer Note: While most agricultural operations are not air pollution sources under the CAA, complaints concerning odor and dust resulting from agricultural operations may be made. These complaints normally come in the form of actions filed under state law against an agricultural producer for nuisance.

B. State Air Quality Laws and Regulations

1. Air Pollution Statutory Provisions

Through DENR, South Dakota administers the provisions of the federal Clean Air Act.¹⁹ Air pollution regulations are also promulgated by the Board of Minerals and Environment (BME).

The state defines air contaminants as dust, fumes, mist, smoke or other particulate matter, vapor, gas, odorous substances, radioactive materials, and combinations of those materials. Air pollution is the presence in the atmosphere of air contaminants at concentrations which tend to be injurious to human health or welfare, animals or plant life, or constitute a common law nuisance.

Air pollution control programs may be administered by local or county authorities if authorized by BME. The board may, however, find that control of contaminants is beyond the ability of the local authority. For this reason, persons who may be required to obtain permits to conduct activities which are potential sources of air pollution are advised to consult BME, DENR, or local authorities to determine the source of air pollution enforcement authority in their area.

Producer Note: Currently there is no agricultural exemption in the South Dakota air pollution regulatory plan, although hardship variances and operation under the general permit system are allowed.

2. Permits and Violations

The state may require a permit for any use of equipment capable of causing or contributing to air pollution or of air pollution control equipment. All persons who are subject to state air pollution regulation who violate permits or operate without them are subject to civil penalties and misdemeanor criminal penalties. Persons who knowingly violate any requirement or permit condition or who disable or make inaccurate any piece of monitoring equipment are subject to additional misdemeanor criminal penalties and fines of up to \$10,000 per violation per day.

A permit applicant must submit in the application:²⁰

- General information concerning the firm and its ownership;

¹⁹ S.D. CODIFIED LAWS ANN. § 34A-1-1 *et seq.* (1992 & Supp. 1996).

²⁰ S.D. ADMIN. R. 74:36:04:01 *et seq.* (1993).

- A description of the plant and the processes used;
- Fuels used, quantities used, and raw materials used in the processes;
- A description of the air pollution equipment in use;
- A plan of abatement; and
- Any other information required, including air dispersion modeling, stack performance testing, and copies of plans and specifications for any equipment or other facilities used in controlling emissions.

Despite a permit, if DENR determines that a source is causing air pollution that poses imminent danger to human health and safety and which requires immediate action, DENR may order cessation of air emissions by way of an emergency order. Those who violate permits may be ordered to implement corrective action plans. Failure to take corrective action subjects violators to civil penalties of up to \$10,000 per day or damages to the environment, or both.

3. *General Permits*

General permits may be issued for certain classes of industries or facilities which are classified as minor sources of air contaminants. Minor source examples are a rock crusher, ready mix concrete plant, or grain elevator which emits less than 100 tons per year of air contaminants and does not emit defined toxic or hazardous substances. These operations do not require individual permits if they operate under a general permit and are not subject to regulation because they do not use toxic or hazardous compounds. The general permit may not be stricter than the federal requirement.

A minor source facility may be required to obtain an individual permit if the operation cannot comply with the general permit, if it is significantly different from the industry standard, if it is causing or has caused a threat to public health or safety, or if a change has occurred in the availability of demonstrated technology for that activity. In addition, violations of the general permit may be cause for requiring an individual permit for the facility.

Producer Note: Facilities of the type for which a general permit has been established should carefully examine their inventory of compounds, particularly fumigants and other similar substances, and the manner in which they use them to determine their potential ability to operate under a general permit, as well as their potential liability under other environmental statutes.

4. *Variances*

Anyone who owns or operates a stationary source of air contaminants may apply for a variance with regard to the quality, extent, or nature of the emission at issue, but no variance is allowed for facilities subject to the federal Clean Air Act. DENR will consider preexisting uses, the interests of the parties, any hardship which strict compliance may cause, availability and cost of pollution abatement methods, compliance schedules, and the potential effect a variance will have on human health and safety. A variance is limited to three years' duration in the case of hardship, and variances may be renewed.

5. *Open Burning*

Negligent open burning is a misdemeanor, as well as burning wood, marsh, prairie, grass, or stubble without a firebreak and without giving due caution to weather conditions.²¹ The offender is liable for the costs of extinguishing these fires. Special open fire permits are also required in the Black Hills forest fire prevention district. In addition, municipalities may prohibit open burning altogether.

Waste oil, tires, tar paper, shingles, or treated railroad ties may not be burned in the open. Agricultural wastes, silvicultural wastes, trees, untreated wood and storm debris may be burned. Agricultural crop burning and burning of vegetation generated by land clearing activities is permissible on-site. However, lessees on state lands may not burn hay, straw, stubble, or stover, and may forfeit their leases or be assessed for damages they cause.²² In addition, in rural areas where no regular collection or disposal of refuse is available, landowners may burn debris in containers with some restrictions, if it is done on the owner's property. Open burning of pesticide containers is allowed in certain situations subject to rules and limitations imposed by DENR.

Producer Note: It is advisable for farmers to consult with local authorities prior to commencing burning operations. Farmers should consult with DENR prior to burning pesticide containers.

²¹ S.D. CODIFIED LAWS ANN. § 34-35-9 *et seq.* (1994).

²² S.D. CODIFIED LAWS ANN. § 5-5-19 (1994).