

2. LEGAL AUTHORITY

2.1 INTRODUCTION

Section 420.11 Legal Authority. of the Requirements for Preparation, Adoption, and Submittal of Implementation Plans sets forth requirements for legal authority that must be available to the State at the time of submission of the Implementation Plan.

As required by Subsection 420.11(c), this section of the Implementation Plan specifically identifies the provisions of State law or regulation which provide the authorities that are required by Section 420.11. The format of Section 420.11 is followed.

Copies of State laws, regulations, and legal opinions of the Attorney General that are referenced are attached as appendices to the Implementation Plan. Copies of State laws are attached as Appendix B; a copy of Regulation No. 23-25, the North Dakota Air Pollution Control Regulations (formerly Regulation No. 82), is attached as Appendix C; and copies of legal opinions of the Attorney General are attached as Appendix D.

2.2 420.11(a)

Subsection 420.11(a) specifies six specific points of legal authority the State must have available.

The State law has been reviewed by the Special Assistant Attorney General assigned to the State Department of Health. It is his legal opinion that Chapter 23-25, Air Pollution Control, of the North Dakota Century Code provides the necessary legal authority directly or indirectly by authorizing the adoption of regulations for each of the six points. His letter of October 20, 1971, which specifically identifies sections of Chapter 23-25 of the North Dakota Century Code giving the required legal authority for each of the six points, is attached in Appendix D.

The sections of Chapter 23-25 of the North Dakota Century Code and of Regulation No. 23-25, the North Dakota Air Pollution Control Regulations, which provide and/or implement the required legal authority for each of the six points are identified in Table 2.

2.3 420.11(b)

Section 420.11(b) is not applicable as the Implementation Plan does not set forth a control strategy that provides for application of (1) inspection and testing of motor vehicles and/or other transportation control measures or (2) land use measures other than those referred to in Section 420.11(a)4.

2.4 420.11(c)

The provisions of State law and regulations which provide the authorities required by Section 420.11 are specifically identified in Section 2.2 of the Implementation Plan and in the Special Assistant

Attorney General's letter of October 20, 1971, attached as Appendix D of the Implementation Plan.

Copies of the State laws that are cited are attached in Appendix B of the Implementation Plan and a copy of Regulation No. 23-25, the North Dakota Air Pollution Control Regulations, is attached as Appendix C of the Implementation Plan.

2.5 420.11(d)

All citations to the North Dakota Century Code are presently existing law effective at the time of submission of the Implementation Plan. Regulation No. 23-25, the North Dakota Air Pollution Control Regulations, became effective law on July 1, 1970, and continues as effective law as of the submission date of the Implementation Plan. Certain sections of Regulation No. 23-25, the North Dakota Air Pollution Control Regulations, have been revised (see Section 11 of the Implementation Plan). These revisions have been approved by the North Dakota Air Pollution Control Advisory Council and adopted by the North Dakota State Health Council as of the submission date of the plan. They will become effective law on February 1, 1972.

2.6 420.11(e)

Section 420.11(e) is not applicable as the State Department of Health has not assigned responsibility for carrying out any portion of the Implementation Plan to any other State governmental agency.

2.7 420.11(f)

The State Department of Health has authorized district, county, and city departments of health to carry out portions of the Implementation Plan within their areas of jurisdiction. When authorized by the State Department of Health, local departments of health are responsible for the enforcement of the portions of Regulation No. 23-25, the North Dakota Air Pollution Control Regulations, pertaining to open burning, nuisances, and visible emissions. The responsibilities and functions of the local departments of health are discussed in detail in Section 8., Source Surveillance, and in Section 10., Intergovernmental Cooperation, of the Implementation Plan.

District, county, and city departments of health have the legal obligation of enforcing, under supervision of the State Department of Health, all rules and regulations promulgated by the State Health Council, including Regulation No. 23-25, the North Dakota Air Pollution Control Regulations. The following sections of Title 23, Health and Safety, of the North Dakota Century Code impose this obligation and gives the local departments of health the legal authority to do so:

Chapter 23-01, State Department of Health

Section 23-01-04, Effect of rules and regulations.
Section 23-01-05, Health officer-qualifications,
salary, term, duties.

Table 2. Sections of Law and Regulations Providing Required State Legal Authority

State Legal Authority Required by 420.11(a)	Section of the North Dakota Century Code, Title 23, Health and Safety, Chapter 23-25, Air Pollution Control, Providing Required Legal Authority	Section of Regulation No. 23-25, the North Dakota Air Pollution Control Regulations, Implementing Required Legal Authority
(1) Adopt emission standards and limitations and any other measures necessary for attainment and maintenance of national standards.	Section 23-25-02(6) Section 23-25-03 Section 23-25-07	Not Applicable
(2) Enforce applicable laws, regulations, and standards, and seek injunctive relief.	Section 23-25-08 Section 23-25-09	Not Applicable
(3) Abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons, i.e., authority comparable to that available to the Administrator under section 303 of the Act.	Section 23-25-09	R23-25-11
(4) Prevent construction, modification, or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard.	Section 23-25-02(6) Section 23-25-03 Section 23-25-07	R23-25-01, Section 1.090
(5) Obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources	Section 23-25-04 Section 23-25-05	R23-25-01, Section 1.050 R23-25-01, Section 1.090 R23-25-01, Section 1.100 R23-25-01, Section 1.110
(6) Require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also authority for the State to make such data available to the public as reported and as correlated with any applicable emission standards or limitations.	Section 23-25-04 Section 23-25-06	R23-25-01, Section 1.100

Chapter 23-03, Organization of County and Township
Boards of Health

Section 23-03-07, Powers and duties of county
superintendent of public health.

Chapter 23-04, Organization of City Board of Health

Section 23-04-05, Powers and duties of city health
officer.

Section 23-04-07, Powers and duties of city physician.

Chapter 23-14, Health Districts

Section 23-14-06, Powers of the district boards of
health.

Section 23-14-07, Duties of health officer.

Such authorization by the State Department of Health to local departments of health does not relieve the State of responsibility under the Act for carrying out such portions of the plan. The State Department of Health by law is given the power to hold the local departments of health responsible for the enforcement of State regulations and supervise the local departments of health under Section 23-01-05.

Copies of the above cited sections of the North Dakota Century Code are attached in Appendix B. The provisions of these sections are discussed in detail in the Special Assistant Attorney General's letter of October 20, 1971, attached in Appendix D.

2.8 FUTURE LEGAL AUTHORITY NEEDS

The State Department of Health will study and evaluate the present State laws and regulations to determine if they effectively and adequately provide the necessary legal authority to control air pollution in North Dakota in the present and in the future. The Department will update Regulation No. 23-25, the North Dakota Air Pollution Control Regulations and will draft legislation for submission to the Legislature if revisions and additions to the regulations and laws become necessary. Particular attention will be given to the study and evaluation of air pollution problems in the areas of transportation, agriculture, odor control, and land-use planning and zoning in the State.

tion as follows:

2.9 Legal Authority to Control Indirect Sources of Air Pollution

Subsection 51.11(a)(4) of the Requirements for Preparation, Adoption, and Submittal of Implementation Plans was amended on June 18, 1973 (38 Federal Register 15834) to require that the State have legal authority to prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard.

As discussed in Subsection 2.2, the State law provides sufficient legal authority to prevent construction, modification, or operation of direct sources (stationary sources) of air pollution.

The State law has been reviewed by Morris A. Tschider, the Special Assistant Attorney General assigned to the State Department of Health

to determine if sufficient legal authority is provided to prevent construction, modification, or operation of indirect sources. It is his legal opinion that Chapter 23-25, Air Pollution Control, of the North Dakota Century Code does not provide sufficient legal authority to exercise the type of control required over indirect sources of air pollution under the June 18, 1973 amendments to Subsection 51.11(a)(4) of the Requirements for Preparation, Adoption, and Submittal of Implementation Plans. His letter of July 24, 1973 to Mr. James W. Sanderson, Assistant Regional Counsel, U.S. Environmental Protection Agency, Denver, Colorado, expressing this opinion is attached in Appendix D.

The Environmental Protection Agency will promulgate regulations concerning the control of indirect sources as revisions to this Implementation Plan by December 15, 1973. These regulations will be administered by the Regional Office of the Environmental Protection Agency in Denver, Colorado.

The North Dakota State Department of Health will draft legislation for submission to the 1975 Legislature to correct the deficiencies of Chapter 23-25, Air Pollution Control, of the North Dakota Century Code concerning legal authority to control indirect sources of air pollution so that the Department can adopt and administer its own regulations to control indirect sources in the State.

Chapter 2 - Section 2.10 LEGAL AUTHORITY TO IMPLEMENT AND ENFORCE FEDERAL NSPS, NESHAPS, AND PSD PROGRAMS

In order to provide adequate legal authority for the State to implement and enforce the Federal Standards of Performance for New Stationary Sources (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPS), and Prevention of Significant Deterioration of Air Quality (PSD) programs and to be delegated the authority to do so by the U.S. Environmental Protection Agency; the State Legislature amended Chapter 23-25 of the North Dakota Century Code, Air Pollution Control, to a large degree in 1975.

Two amendments were passed by the State Legislature in 1975. They were House Bill No.1055 and House Bill No.1057. House Bill No.1055 amended subsection 2 of Section 23-25-02 to require that one of the three at large members of the air pollution advisory council be a representative of the environmental sciences. House Bill No.1057 significantly revised the air pollution control law including the addition of a declaration of public policy and legislative intent, the addition of the power to regulate odors, indirect sources, and water vapor, setting requirements for and authorizing a permit system, reducing the power of the air pollution advisory council to that of recommendation only, and changing the sections on on-site inspections, confidentiality of records, and penalties for violations to be equal to those of the Federal Clean Air Act. The two amendments went into effect on July 1, 1975. Copies of the two amendments to Chapter 23-25 of the North Dakota Century Code are attached in Appendix B as applicable State statutes.

Legal authority is required by the U.S. Environmental Protection Agency in seven categories for a State to be delegated authority to implement and enforce the Federal NSPS, NESHAPS, and PSD programs. The seven categories and the State statutory authority to implement each is as follows:

(1) PRECONSTRUCTION REVIEW

The North Dakota Century Code, Sections 23-25-03 and 23-25-04.1, provide the authority for registration of sources and preconstruction review of new or modified sources to implement the program the State Department of Health has set forth by rule and regulation in relation to NSPS, NESHAPS, and PSD.

(2) SUBSTANTIVE STANDARDS

The basic grant of authority to the Department of Health is contained in North Dakota Century Code, Section 23-25-03. This section provides adequate power to adopt the substantive NSPS and NESHAPS standards and PSD regulations which the State Department of Health has incorporated into its rules and regulations.

(3) SURVEILLANCE OF SOURCES

Sections 23-25-03 and 23-25-06 of the North Dakota Century Code, grant the State Department of Health the authority to require that records, books, files and other information relative to emissions be maintained by the sources and to require access by the Department to such records.

Section 23-25-05 provides the right of on-site inspection by the Department of any source in order to ascertain compliance with Chapter 23-25 and any of the rules and regulations enforced pursuant thereto.

The power to require maintenance of records, to have access to records and to conduct field investigations regarding any individual source allows the Department to fully implement the standards, regulations and procedures regarding NSPS, NESHAPS, and PSD which have been adopted and incorporated into its rules and regulations.

(4) PUBLIC DISCLOSURE

Section 23-25-06 requires that all records, reports or information obtained under the chapter (with the exception of trade secrets as determined by the Department) shall be available to the public.

(5) ENFORCEMENT

The enforcement procedures available under the North Dakota Air Pollution Control Law are listed in Section 23-25-10. Although that section provides for civil penalty, it does not deny use of injunctive relief where appropriate. All of the same sanctions are available for enforcement of NSPS, NESHAPS, and PSD programs. Section 23-25-10 further provides that the State Department of Health shall turn all evidence and findings over to the State Attorney General for "any remedial action his office determines appropriate, including an action for injunctive relief."

(6) DELEGATION

Since the state law provides adequate authority to carry out programs equivalent to NSPS, NESHAPS, and PSD independent of Federal law, and since these programs have been effectively incorporated into State rules and regulations, no delegation by the U.S. Environmental Protection Agency under Section 111(c) or Section 112(d) of the Federal Clean Air Act or Section 52.21(f) of Title 40 Code of Federal Regulations Part 52 will confer on the State any power it does not already have. Therefore if delegation is made pursuant to the State's request, it would appear that its practical effect will be to eliminate a system of dual procedures, tests and approvals. Delegation would obviate the necessity for a source to deal with the U.S. Environmental Protection Agency in respect to NSPS, NESHAPS, and PSD (except in the unlikely case where State authorities fail to enforce). It is recognized that no delegation prohibits the U.S. EPA from enforcing any standards or regulations under NSPS, NESHAPS, and PSD.

(7) EMERGENCY ACTION

Section 23-25-07 explicitly grants the State Department of Health the power to act immediately without notice or hearing if the Department recognizes the existence of an emergency. The section applies to all of Chapter 23-25 and would allow the power of emergency action in regard to any NSPS, NESHAPS and PSD source.