

**OPINION
77-40**

June 2, 1977 (OPINION)

The Honorable Steven J. Swiontek
State Representative
District 45
134D Ct. University Village
Fargo, ND 58102

Dear Representative Swiontek:

This is in response to your letter of May 20, 1977, wherein you expressed concern about the odor from the American Crystal Sugar facility in Moorhead, Minnesota.

With regard to the Environmental Law Enforcement Act of 1975, (copy enclosed) this Act provides a procedural remedy by which an "aggrieved" plaintiff may directly enforce environmental statutes and regulations otherwise enforceable by state agencies charged with their enforcement. The Act grants jurisdiction to the court to enforce, by private lawsuit, laws and regulations which otherwise may be enforceable only by the state agency.

As to which court is given jurisdiction, in the manner provided by Chapter 32-40, it is unlikely that a state procedural law grants jurisdiction to a federal court. The language "appropriate district court" in Section 32-40-06, must therefore be read as referring to a state district court.

This is not to say, however, that the environmental statutes and regulations of this state cannot ever be enforced in federal court. As a general rule, federal courts enforce the substantive laws of the host state via federal procedure. A state agency might, under this general rule, enforce its statutes in federal court, if it can otherwise satisfy federal jurisdictional requirements. What the law does require is that state law cannot, in all probability, give a federal court the power to hear and decide a case in the manner provided by Chapter 28-32.

Concerning the use of Chapter 28-32 in the particular case of the Moorhead facility, a plaintiff would first have to satisfy the very basic requirements of being "aggrieved" under the statute (Section 32-40-03.1) and then follow the procedures specified in Section 32-40-07, before bringing his lawsuit. In order to prevail in such a suit, a plaintiff would also have to show that the environmental statute or regulation in question was, in fact, violated. In this case, the most applicable regulations are the North Dakota State Department of Health's Air Quality Regulations. Department of Health officials in the Division of Environmental Engineering may be contacted for copies of these regulations and other information concerning possible violations of the same.

Sincerely,

ALLEN I. OLSON

Attorney General