

Testimony  
to  
Legislative Council's  
Administrative Rules Committee  
March 11, 2009

Good afternoon Mr. Chairman and members of the committee. My name is Tom Bachman and I am with the Air Quality Division of the Health Department. I am here to address changes to Article 33-15, Air Pollution Control.

The proposed changes to Article 33-15 are not due to any statutory changes made by the Legislature. The rules are made to update State rules to match Federal rules and interpretations of those rules. The primary reason for adopting these revisions was to maintain primacy for the major air pollution control programs in North Dakota. The Department could choose not to adopt the Federal rules, but would lose the authority to regulate certain areas of the Clean Air Act.

The rule revisions provide requirements when a source is claiming a malfunction was unavoidable, update the Ambient Air Quality Standards for ozone and particulate matter to the same as the Federal standards, adopt Federal rules for gas turbines, acid rain sources, prevention of significant deterioration as well as deleting Federal rules that have been vacated by U.S. courts. A summary of the proposed changes are attached to my testimony.

The process of adopting amendments to the North Dakota Air Pollution Control Rules involves the review by the Air Pollution Advisory Council, approval to proceed to public comment by the State Health Council, a public notice, a public hearing and comment period, response to any comments, approval of the final draft by the Air Pollution Advisory Council, the State Health Council, and the Attorney General. Public notice regarding the hearing for these rules and the public comment period was given by an abbreviated notice published twice in all 53 official county newspapers as well as a press release, notification to the Legislative Council and an announcement on the Department's website. The public hearing regarding amendments was held on October 7, 2008.

During the public hearing, oral comments were received from one party, Montana Dakota Utilities. Written comments were received from the U.S. Environmental Protection Agency, Tesoro Refining and Marketing Company and Plains Justice. MDU asked for guidance on inadequate maintenance and asked the Department to review previous guidance to assure it is still up-to-date. MDU also questioned the removal of the word "reasonable" from language in Chapter 33-15-15, Prevention of Significant Deterioration. The particular language requires a source to make calculations and submit information to the Department when there is a "reasonable" possibility that a major modification would occur. The U.S. EPA has tried to define "reasonable"; however, they have been sued by the State of New Jersey over their definition and have agreed to reconsider it. To get approval of our program from EPA, we have deleted the word reasonable. When all litigation is over, we will make any necessary changes. Tesoro Refining and Marketing Co. had concerns about the term "adequate design" and other

language regarding the unavoidable malfunctions section in Chapter 33-15-01. We have made changes to the language which satisfied Tesoro's concerns. Plains Justice, an environmental group, expressed concerns about Chapter 33-15-15, Prevention of Significant Deterioration. The concerns were not with the language in the rule; but, with the implementation of a portion of the rule. Plains Justice believes the Department should not use  $PM_{10}$ , which is particulate matter less than 10 microns in size, as a surrogate for  $PM_{2.5}$ , which is particulate matter less than 2.5 microns in size. The U.S. Environmental Protection Agency has published guidance which allows the states to use  $PM_{10}$  as surrogate for  $PM_{2.5}$  until 2011. The Department believes that emission factors, stack testing methods and modeling techniques need to be refined prior to implementing  $PM_{2.5}$  requirements. The Department has not adopted the requirements for  $PM_{2.5}$  but will by 2011. At that time, we will no longer use  $PM_{10}$  as a surrogate for  $PM_{2.5}$ .

The comments from the U.S. Environmental Protection Agency were minor and changes were made to address their concerns. These included changes to the definition of "excess emissions", requiring quarterly reporting of unavoidable malfunctions, and requiring sources that use an alternative monitoring method to prove that the monitoring is accurate. EPA also commented on several sections of the rules that were not proposed for revision. The Department will address those comments when we revise those sections of the rules.

The cost for giving public notice and holding a hearing on the rule revisions was approximately \$3,400. There were no other costs when staff time is excluded.

A regulatory analysis, a takings assessment, an evaluation of rules more strict than federal standards, a stringency determination and justification, and a small entities analysis was prepared for the proposed revisions. A copy of these documents are attached to my testimony.

Finally, these rules were not adopted as emergency rules. The Department followed the normal adoption procedure.

At this time I would be happy to answer any questions that you may have.

Amendments to  
North Dakota Air Pollution Control Rules  
Revision Summary

The following summarizes the proposed changes to the North Dakota Air Pollution Control Rules.

**Chapter 33-15-01 - General Provisions**

Section 33-15-01-04.2 - Text was added to further define "air contaminant" as that which is emitted to the ambient air.

Section 33-15-01-04.10 - This section was added to define the term "excess emissions." The subsequent sections were renumbered.

Section 33-15-01-04.32 - This section was added to define the term "PM<sub>2.5</sub>." The subsequent sections were renumbered.

Section 33-15-01-04.52 - The baseline date for incorporation by reference was updated to March 1, 2008.

Section 33-15-01-05 - The abbreviations for "PM" and "PM<sub>2.5</sub>" were added.

Section 33-15-01-13.1.f - This section was added to state that the excess emissions are not authorized.

Section 33-15-01-13.2.a - A portion of this section was deleted to preclude the possible perception that the Department might authorize the release of emissions in excess of a limit.

Section 33-15-01-13.2.c - This section was added to address excess emissions as a result of an unavoidable malfunction.

Section 33-15-01-13.3 - Text was both deleted and added to revise the requirements for alternative emissions monitoring in the event of failure of a continuous emission monitoring system.

**Chapter 33-15-02 - Ambient Air Quality Standards**

Table 1 - Two ambient air quality standards were amended (PM<sub>10</sub> and ozone) and one was added (PM<sub>2.5</sub>) to reflect revisions to the federal standards.

#### **Chapter 33-15-05 - Emissions of Particulate Matter Restricted**

Section 33-15-05-03.2.2.d - This section which discussed operator actions to be taken in the event of an incinerator malfunction was deleted.

#### **Chapter 33-15-12 - Standards of Performance for New Stationary Sources**

Section 33-15-12-01.1 - The baseline date for incorporation by reference was updated to March 1, 2008.

Section 33-15-12-02, Subpart Da - A sentence was added to reflect the deletion from this subpart of requirements for mercury.

Section 33-15-12-02, Subpart HHHH - This subpart was deleted to reflect vacatur of the federal rule concerning coal-fired electric steam generating units.

Section 33-15-12-02, Subpart KKKK - This subpart was added to reflect an addition to the federal rule concerning stationary combustion turbines.

#### **Chapter 33-15-13 - Emission Standards for Hazardous Air Pollutants**

Section 33-15-13-01.1 - The baseline date for incorporation by reference was updated to March 1, 2008.

#### **Chapter 33-15-14 - Designated Air Contaminant Sources, Permit to Construct, Minor Source permit to Operate, Title V Permit to Operate**

Section 33-15-14-01.14 - The field of applicable sources was limited to major sources.

Section 33-15-14-02.4.a - The text was revised to reflect the current name of the Division of Air Quality.

Section 33-15-14-02.4.b(2) - The text was revised to reflect the current ZIP code of Research Triangle Park.

Section 33-15-14-02.6.c - The reference to the location of the text concerning public participation was revised.

Section 33-15-14-02.13.o - A reference was revised.

Section 33-15-14-06.1.c - An incorrect reference to title VI was corrected to refer to title IV.

#### **Chapter 33-15-15 - Prevention of Significant Deterioration of Air Quality**

Section 33-15-15-01.2 - The baseline date for incorporation by reference was updated to August 1, 2007, and paragraphs referenced were updated.

Section 33-15-15-01.2, 40 CFR 52.21(b)(2)(a) - The reference to the provisions for routine maintenance, repair and replacement in Section (cc) is being deleted.

Section 33-15-15-01.2, 40 CFR 52.21(b)(58) - The paragraph is being deleted.

Section 33-15-15-01.2, 40 CFR 52.21(i)(5)(ii) - A correction to a reference is being made.

Section 33-15-15-01.2, 40 CFR 52.21(l)(1) - The date of appendix W of 40 CFR 51 was revised.

Section 33-15-15-01.2, 40 CFR 52.21(q) - The letter designation of paragraph q was corrected.

Section 33-15-15-01.2, 40 CFR 52.21(q)(2) - The paragraph is being clarified to indicate the Department must make a preliminary determination in one year.

Section 33-15-15-01.2, 40 CFR 52.21(q)(2)(f) - The length of time allowed for an applicant's response to public comments was extended and procedures were added to allow for an additional extension.

Section 33-15-15-01.2, 40 CFR 52.21(r)(6) - The word "reasonable" is being deleted.

Section 33-15-15-01.2, 40 CFR 52.21(y)(3)(ii), (y)(7), and (z)(5) - Text previously substituted for the federal rule was deleted.

#### **Chapter 33-15-21 - Acid Rain Program**

Section 33-15-21-08.1 - The baseline date for incorporation by reference was updated to March 1, 2008.

Section 33-15-21-10 - The baseline date for incorporation by reference was updated to March 1, 2008.

#### **Chapter 33-15-22 - Emission Standards for Hazardous Air Pollutants for Source Categories**

Section 33-15-22-01 - The baseline date for incorporation by reference was updated to March 1, 2008.

Section 33-15-22-03, Subpart HH - A statement was added to indicate that only major source requirements are adopted.

Section 33-15-22-03, Subpart DDDDD - This section was deleted because the subpart was vacated.

Section 33-15-22-03, Subpart JJJJ - This section was deleted because the subpart was vacated.

### **Chapter 33-15-23 - Fees**

Section 33-15-23-03.1 - The definition of a "designated" source was simplified. The State government fee rate was expanded to include local government.

Section 33-15-23-03.4 and Section 33-15-23-04.11 - The date the annual permit fee is due is being defined as sixty days following the date of the billing letter to provide a more precise due date.

**RULE REVISION ANALYSIS AND ASSESSMENT****I. NDCC 28-32-08 Regulatory Analysis****Background**

Section 28-32-08 of the North Dakota Century Code requires the Department to issue a regulatory analysis on any rule revision if a request for the analysis is filed by the Governor or a member of the Legislature within 20 days after the last published notice of the proposed rule hearing or if the proposed rule is expected to have an impact on the regulated community in excess of \$50,000. The following analysis is prepared to comply with the requirements of that section, and is being prepared for the following chapters of the Air Pollution Control Rules under consideration:

- Chapter 33-15-01 - General Provisions
- Chapter 33-15-02 - Ambient Air Quality Standards
- Chapter 33-15-05 - Emissions of Particulate Matter Restricted
- Chapter 33-15-12 - Standards of Performance for New Stationary Sources
- Chapter 33-15-13 - Emission Standards for Hazardous Air Pollutants
- Chapter 33-15-14 - Designated Air Contaminant Sources, Permit to Construct, Minor Source Permit to Operate, Title V Permit to Operate
- Chapter 33-15-15 - Prevention of Significant Deterioration of Air Quality
- Chapter 33-15-21 - Acid Rain Program
- Chapter 33-15-22 - Emission Standards for Hazardous Air Pollutants for Source Categories
- Chapter 33-15-23 - Fees

**Classes of People Probably Affected**

Proposed amendments to the Air Pollution Control Rules have the potential to affect a wide variety of businesses and industries that emit air contaminants. The businesses that will be affected most are power plant operators, manufacturing plant operators, and ethanol production plant operators.

**Probable Impact Including Economic Impact**

Most of the changes that are being proposed will have no additional impact for regulated Sources. The changes to Chapters 1, 2, 12, 13, 21 and 22 are being made to make them consistent with existing federal rules and requirements. Since affected sources must comply



with the federal rules, implementation by the Department will not have any additional impact.

The revisions to 33-15-01-13 are being made to assure consistency with the Federal Clean Air Act. Operators of air contaminant sources will be required to prove that a malfunction is unavoidable. This could require more time on the part of the operator. The cumulative cost for all sources regulated could exceed \$50,000 per year. However, based on the last two years, the cost is expected to be less than \$50,000 per year.

The deletion of text in Chapter 5 removes a specific procedure to be taken in the event of incinerator malfunction, thus allowing operator actions to be tailored to the specific equipment and conditions involved in an effort to minimize emissions. There is no increased cost to the operator and flexibility in operations is increased.

The changes to Chapter 14 are administrative in nature updating references, addresses, organizational names, etc.

In Chapter 15, baseline incorporation by reference dates were updated and the time allowed for permit applicants to respond to public comments was extended.

The changes to Chapter 22 largely delete references to federal Hazardous Air Pollutant (HAP) subparts that have been vacated by the courts. Added text clarifies that ND has adopted Subpart HH (oil and natural gas production) only as it pertains to major sources. This will result in no cost to permittees above that due to the federal requirements.

The changes to Chapter 23 will eliminate annual air permit fee costs for local governments by including them in the state fee rate of "zero" (dollars).

#### **Probable Costs to the Department**

The revisions to most chapters will have little effect on costs to the Department. Costs for the Department will be reduced by not requesting delegation the federal HAP rule for oil and gas production in Chapter 22 as it pertains to minor sources. Inspection and enforcement of this portion of this rule will remain a federal responsibility.

The Chapter 23 inclusion of local governments in the state annual air permit fee rate will reduce department fee collections by



approximately \$2,000 per year, a small part of the \$1.4 million collected annually through annual air permit fee program.

### **Alternative Methods Considered**

The changes to Chapters 1, 2, 12, 13, 21 and 22 incorporate by reference existing federal regulations or make them consistent with the Clean Air Act. The Department could choose to not adopt the federal regulations; however, EPA would then disapprove North Dakota's programs. This could mean a loss of highway construction funds, requirements for new sources to obtain emissions offsets and much higher fees under Title V.

Not making the change to Chapter 5 may result in some instances of increased emissions during events involving incinerator malfunctions by restricting operators to a predetermined course of action that may not provide optimum control of emissions.

The changes to Chapter 22 could be suspended, but that would result in continued references to obsolete federal rules.

If the Chapter 23 change to revise the annual air permit fee charged to local governments is not made, then several local governments will pay fees that are normally charged only to non-government entities.

The changes to the other chapters are considered minor and the alternative is not to make them. However, we believe the clarifications and updates are necessary for efficient use of the ND Air Pollution Control Rules.

## **II. NDCC 28-32-09**

### **Takings Assessment**

#### **Background**

This section of the North Dakota Century Code requires the Department to prepare a written assessment of the constitutional takings implication of a proposed rule that may limit the use of private real property. The assessment must:

- a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
- b. Clearly and specifically identify the purpose of the proposed rule.
- c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.

- d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
- e. Identify the source of payment within the agency's budget for any compensation that may be ordered.
- f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

### **Assessment**

- a. The proposed rules update the North Dakota Air Pollution Control Rules to be consistent with the Clean Air Act and the rules promulgated thereunder. The proposed rules will not limit the use of landowner's private real property. The rules are in accordance with State and Federal law and their adoption is therefore not a "regulatory taking."
- b. The purpose of the proposed rules are to update existing State rules to be consistent with federal requirements, and provide clarifications and updates.
- c. No alternative action is available for federal rules that are being adopted. The Department could choose to request delegated authority for HAP Subpart HH relative to minor sources; however, this would result in no change in emission standards and the State would incur the costs of implementation, inspection and enforcement without any increase in revenue.
- d&e For federal rules that are being adopted by reference, affected sources are already subject to them and State adoption will not change that fact. The other changes do not affect any private real property.
- f. Implementation of federal rules by the State generally produce lower costs.

### **III. NDCC 23-25-03.3      Requirements for rules more strict than Federal Standards (or no corresponding federal rules)**

#### **Background**

This section of the North Dakota Century Code requires the Department to provide a risk assessment for any rules that affect coal conversion and associated facilities, petroleum refineries, or oil and gas production and processing facilities that are proposed

for adoption that are more stringent than federal requirements or when there are no corresponding federal rules. This risk assessment would include a demonstration of a substantial probability of significant impacts to public health or property, a cost-benefit analysis that affirmatively demonstrates that the benefits of the more stringent or additional state rules and standards will exceed the anticipated costs, and the independent peer reviews required by this section of the Century Code.

### **Analysis**

Other than minor administrative changes, the proposed rule changes are based on federal rules. These changes are not more stringent than the underlying federal requirements.

## **IV. NDCC 23-01-04.1 Stringency Determination and Justification**

### **Background**

Section 23-01-04.1 requires the North Dakota Department of Health to make a written finding that any corresponding federal regulations are not adequate to protect the State's public health and environmental resources when adopting more stringent rules. This requirement is addressed with the information which follows.

### **Explanation**

#### **Chapter 33-15-01 - General Provisions**

A baseline date for incorporation by reference are being updated. Therefore, the change is equivalent to federal requirements. A few definitions and abbreviations are being added or revised to be consistent with federal use. Therefore, there is no change in the stringency of the federal rules. The changes to the shutdown/malfunction rule are required by EPA to be compatible with Federal requirements.

#### **Chapter 33-15-02 - Ambient Air Quality Standards**

Two ambient air quality standards were amended (PM10 and ozone) and one was added (PM2.5) to reflect revisions to the federal standards. The State ambient air quality standards for these pollutants are the same as the Federal Standards. Therefore, there is no change in the stringency of the federal rules.

Chapter 33-15-05 - Emissions of Particulate Matter Restricted

An operator action that was previously required during incinerator malfunctions was deleted. Since the required action was not a federal requirement, the result is a rule that is neither more nor less stringent than the federal requirements.

Chapter 33-15-12 - Standards of Performance for New Stationary Sources

The changes reflect the court vacatur of some federal rules and the addition or revision of other federal rules. Therefore, there is no change in the stringency of the federal rules.

Chapter 33-15-13 - Emission Standards for Hazardous Air Pollutants

The baseline date for incorporation of the federal rules by reference is being updated. Therefore, there is no change in the stringency of the comparable federal rule.

Chapter 33-15-14 - Designated Air Contaminant Sources, Permit to Construct, Minor Source Permit to Operate, Title V Permit to Operate

Only minor technical changes and corrections are being made. The field of applicable sources for which ND has accepted 40 CFR 63 (HAP) delegation is being limited to major sources. Minor sources to which 40 CFR 63 rules apply must still comply with the federal requirements. Therefore, there is no change in the stringency of the comparable federal rule.

Chapter 33-15-15 - Prevention of Significant Deterioration of Air Quality

The changes incorporate by reference the latest version of the Federal rules. Text previously substituted for the federal rule was deleted. Therefore, there is no change in the stringency of the comparable federal rule.

Chapter 33-15-21 - Acid Rain Program

The baseline date for incorporation of the federal Acid Rain Program rules by reference is being updated. Therefore, there is no change in the stringency of the comparable federal rule.

Chapter 33-15-22 - Emission Standards for Hazardous Air  
Pollutants for Source Categories

The changes to this Chapter revise the baseline date for incorporating by reference existing federal regulations and delete several subparts. The field of applicable sources for which ND has accepted 40 CFR 63 (HAP)delegation is being limited to major sources. Minor sources to which 40 CFR 63 rules apply must still comply with the federal requirements. Therefore, the changes are no more stringent than federal requirements.

Chapter 33-15-23 - Fees

Federal rules do not specify an annual air permit fee amount to be charged to local governments, nor do they state the date by which such fees must be paid. Therefore, the changes recommended are neither more nor less stringent than federal rules.

**V. NDCC 28-32-08.1 Small Entities Analysis**

Nearly all of the changes to the State Air Pollution Control Rules are mandated by changes to federal rules or are necessary to be consistent with the Clean Air Act. The changes will not affect any small entities.