

ND Legislative Council
Administrative Rules Committee
March 10, 2011

Testimony by: Tom Bachman
ND Department of Health

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.

1. The rule changes do not result from any statutory changes made by the legislature.
2. The changes to the rules are related to rules adopted by EPA under the Clean Air Act. The rule changes were made to update state rules to match federal 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 portions of the Clean Air Act and the State could face sanctions.
3. The process of adopting amendments to the North Dakota Air Pollution Control Rules involves the review by the Air Pollution Advisory 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 the amendments was held on August 19, 2010.

The rules were approved by the Air Pollution Advisory Council on September 20th; by the Attorney General on October 27th, and by the State Health Council on November 9th. The rules were submitted to the Legislative Council on November 9th.

4. During the public hearing oral comments were received from one person. This person was concerned about the Department's modeling methodology and indicated detailed comments would be submitted in writing. No written comments were received from this individual. The modeling methodology used by the Department is reviewed by EPA, Federal Land Managers and others. EPA has oversight authority if the modeling is not correct.

Written comments were received from the U.S. EPA and another individual. EPA's only significant comment was concerning the new ambient air quality standard for sulfur dioxide. EPA indicated the 3-hour and 24-hour standards remain in effect until one year after attainment designations are made. The Department revised the rule based on this comment and included a notice within the rule that the standards are still in effect until one year after the designations. Other minor revisions were made based on EPA's comments.

The comment from the individual suggested that all rule revisions should always make the rules more stringent and more ambient monitoring should be required. All rule revisions that are proposed that affect emissions are identical to Federal requirements and are more stringent than current requirements including new ambient air quality standards for sulfur dioxide, nitrogen dioxide and lead. The rules do not require ambient monitoring. However, the Department will consider the commentor's request for more ambient monitoring.

5. The approximate cost of giving public notice, holding a hearing, developing and adopting the rules is \$4,000.
6. The rule revisions updated State rules to match Federal rules. This included changes to the Ambient Air Quality Standards, Standards of Performance for New Stationary Sources, Prevention of Significant Deterioration, Title V Permit to Operate program, Acid Rain Program, and Emission Standards for Hazardous Air Pollutant for Source Categories.
7. A Regulatory Analysis was prepared. There were no requests for the analysis. A copy is attached to my testimony.
8. A Small Entity Analysis was not required.
9. A Constitutional Takings Assessment was prepared. A copy of the assessment is attached to my testimony.
10. There rule revisions were not adopted as emergency rules.

At this time, I will be happy to answer any questions you may have.

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 33-15-12 - | 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 |

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 sources that use stationary engines for power generation or natural gas compression and medical waste incinerators.

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 and Sections 6 and 10 of Chapter 14 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 other changes to Chapter 14 reduce the permitting requirements for sources that are installing units that are subject to requirements under Chapters 12, 13 and 22 for which the Department is not taking delegation. This should reduce costs for the source.

Probable Costs to the Department

The revisions to most chapters will have little immediate effect on costs to the Department. The changes to Sections 1, 2 and 3 of Chapter 14 will reduce permitting requirements for the Department and thus reduce costs.

Alternative Methods Considered

The changes to Chapters 1, 2, 12, 13, 21, 22 and Sections 6 and 10 of Chapter 14 incorporate 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.

The changes to the Sections 1, 2 and 3 of Chapter 14 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 and to reduce permitting requirements.

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 changes to Sections 1, 2 and 3 of Chapter 14 will reduce costs for both affected sources and the Department.
- 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

The proposed rule changes incorporate changes to 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 is being updated. Therefore, the change is equivalent to federal requirements.

Chapter 33-15-02 - Ambient Air Quality Standards

Three ambient air quality standards were amended (NO₂, SO₂ and lead) 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 33-15-12 - Standards of Performance for New Stationary Sources

The addition or revision of the rules were made to be consistent with the 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

The changes to Sections 1, 2 and 3 reduce the permitting burden. The changes to Sections 6 and 10 update the rules to match 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. 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 incorporate by reference a standard for reciprocating internal combustion engines. Therefore, the changes are no more stringent than federal requirements.

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. Small entities are subject to the rules whether the Department adopts them or not; however, the changes are not expected to affect any small entities.