

Administrative Rules Committee  
March 10, 2011

Underground Storage Tank Rules  
N.D.A.C. Article 33-24  
North Dakota Department of Health

Mr. Chairman and members of the committee, my name is Scott Radig and I am the Director of the Waste Management Division of the Health Department. I am here to provide information relating to the adoption of amendments to N.D.A.C. chapter 33-24-08, Underground Storage Tank (UST) Rules.

1. *Whether the rules resulted from statutory changes made by the Legislative Assembly.*

These amendments to the rules are a result of statute changes to N.D.C.C. chapter 23-20.3 which expanded the department's authority to adopt UST rules which are no more stringent than the federal Resource Conservation and Recovery Act, including the requirements of the federal Energy Policy Act of 2005.

2. *Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.*

The State of North Dakota is approved to administer and enforce the underground storage tank program in lieu of the federal program. The State's program, as administered by the Department of Health, was approved by the USEPA and became effective on December 10, 1991. The funding for the North Dakota UST program is principally derived from federal grants through EPA.

On August 8, 2005, President Bush signed the Energy Policy Act of 2005. Title XV, Subtitle B of this Act (entitled the Underground Storage Tank Compliance Act of 2005) contained amendments to Subtitle I of the Solid Waste Disposal Act, the original legislation that created the UST Program. The new law mandated changes to states UST rules. The changes were phased in through 2012, and are intended to reduce UST releases to the environment. These amendments to the rules are necessary for the department to continue to receive federal grants to fund the UST program.

3. *A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.*

The State Health council conditionally approved the proposed rule revisions and gave authorization to hold public hearings and receive comment. Public hearing notices were published in all county newspapers (52) throughout the state between June 15, 2010 and June 21, 2010. Notice was also sent to the Legislative Council. A public hearing was held July 14, 2010 in Bismarck. The public comment period was held open until July 24, 2010. On July 28, 2010 all pertinent information on the rules was submitted to the Attorney General for

legal opinion. The Office of Attorney General examined the proposed amendments to N.D.A.C. chapter 33-34-01. The Attorney General determined that a written record of the agency's consideration of any comments to the proposed rules was made, a regulatory analysis was not issued or requested, a takings assessment was not prepared, a small entity regulatory analysis and economic impact statement were not prepared because the rules are mandated by federal law, and the proposed rules are within the agency's statutory authority. On October 28, 2010 an opinion from the Office of Attorney General was given that stated the administrative rules comply with N.D.C.C. chapter 28-32 and are hereby approved as to their legality. All pertinent information was subsequently sent to the Legislative Council for publication into the North Dakota Administrative Code.

4. *Whether any person has presented a written or oral concern, objection or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection or complaint. Please summarize the comments of any person who offered comments at the public hearing on these rules.*

One letter of comment was received from a private engineering firm asking when the underground storage tank operator inspections were to begin? The Department responded by adding a "beginning" date to the appropriate section of the rules.

The public hearing was attended by one industry representative; his comments and the agency's responses were summarized in a department memo dated July 27, 2010 (see attached memo). These comments did not result in any changes to the proposed amendments.

5. *The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.*

The cost for publication of the rule revisions and public hearing notices was \$1,730.54. The only other expense was for staff time to develop the rules (approximately 0.2 FTE).

6. *An explanation of the subject matter of the rules and the reasons for adopting those rules.*

The proposed amendments to the North Dakota UST Rules complete the incorporation of all of the requirements of the Underground Storage Tank Compliance Act. The Underground Storage Tank Compliance Act was part of the federal Energy Policy Act (EPAct) of 2005. The EPAct obligated states to modify their UST rules to comply with minimum requirements, as interpreted through guidance issued by the U.S. EPA, in order to continue to receive federal funding for their respective state programs. The 2005 law was aimed at reducing UST releases to our environment.

This revision of the rules specifies training requirements for three distinct classes of underground storage tank operators: (1) persons having primary responsibility for on-site operation and maintenance of underground storage tank systems; (2) persons having daily on-site responsibility for the operation and maintenance of underground storage tanks systems; and (3) daily on-site employees having primary responsibility for addressing emergencies presented by a spill or release from an underground storage tank system.



7. *Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.*

A regulatory analysis was not issued or requested.

8. *Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.*

A small entity regulatory analysis and an economic impact statement were not prepared because the rules are mandated by federal law.

9. *Whether a constitutional takings assessment was prepared as required by NDCC Section 23-32-09. Please provide a copy if one was prepared.*

A takings assessment was not required because the amendments do not limit the uses of real property.

10. *If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.*

The rules were not adopted as emergency rules.

In a final issue, the Department of Health does have a comment regarding a grammatical change made by the Legislative Council, in Section 33-24-08-48 regarding operator retraining requirements, shown below.

**33-24-08-48. [Reserved] Operator retraining requirements.** If the department determines an underground storage tank system is out of compliance, the class A and/or class B operator must be retrained within ninety days or another reasonable period of time determined by the department. ...

The code revisor struck out the "and/" portion of "and/or". The Department agrees that the use of "and/or" is not grammatically correct. However, it does change the meaning of the section. Depending on the type of compliance issue, either the class A operator, or the class B operator, or both, could be required to be recertified, not necessarily just one or the other. We respectfully suggest that "class A or class B operator" be changed to "class A operator or class B operator, or both,".

That concludes my testimony and I am happy to answer any questions you may have.