



stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments and the Attorney General's review.

4. A public hearing on the proposed rules was held in Bismarck on December 20, 2022. The record was held open until 5:00 PM on, December 30, 2022, to allow written comments to be submitted. Six individuals attended the public hearing. One individual provided a comment from notes, a copy of which was provided. One additional written comment was received within the comment period. A summary of comments is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$2,809.70.
6. The proposed rules create chapter 33-03-35. The following specific language was created:

**Section 33-03-35-01** is created to provide definitions for "facility", "residential services", "support services", and "volunteer services".

**Section 33-03-35-02** is created to outline the licensure process for facilities, and to provide for inspection. The section requires the facility to submit floor plans for review by department, and outlines costs for plan review fee schedules based on size and project costs. The section also details fees required for

application for a license for facilities not owned by the state or its political subdivisions.

**Section 33-03-35-03** is created to permit the department to waive licensure requirements under certain circumstances.

**Section 33-03-35-04** is created to outline the requirements for a governing body of a facility and to outline the duties of the governing body. The section requires the governing body to have an agreement with a hospice program to provide hospice services, and details what responsibilities must be spelled out in the agreement.

**Section 33-03-35-05** is created to identify the codes and standards that the facility must comply with, including accessibility standards, requirements for food and beverage establishments issued by the department, plumbing standards, electrical wiring standards, and boiler rules and regulations.

**Section 33-03-35-06** is created to require a facility to submit plans and specifications to the department for approval for all construction, remodeling, and installations subject to review. The facility is required to contact the department prior to any substantial changes in or alterations to a facility. Start of construction is not permitted until department has approved the final plans. The section also establishes that the department has the authority to make inspections during construction, remodeling, or installation.

**Section 33-03-35-07** is created to detail fire safety standards for a facility.

**Section 33-03-35-08** is created to outline the general building requirements for a facility, including specifications and required

amenities for each dwelling unit.

**Section 33-03-35-09** is created to require the facility to keep accurate, current, and confidential records for all patients, to identify what information must be included within patient records, and to establish a retention period for patient records.

**Section 33-03-35-10** is created to require the facility to coordinate with the licensed hospice provider for the administration and provision of pharmaceutical services. The section also details medication storage and administration requirements.

**Section 33-03-35-11** is created to require the facility to meet the dietary needs of patients and provide dietary services that comply with state sanitary requirements for food establishments. The Department respectfully requests the committee to remove “and the North Dakota Century Code chapters 19-02.1 and 23-09” from the proposed rule.

**Section 33-03-35-12** is created to identify housekeeping, maintenance, and laundry services that the facility shall provide to patients.

**Section 33-03-35-13** is created to provide that admission and discharge planning for hospice patients must be coordinated with a licensed hospice program.

**Section 33-03-35-14** is created to require a facility to maintain a sufficient number of qualified staff and volunteers who are trained and competent to provide necessary care and services. The section also requires a facility to employ or contract with a registered nurse to meet the needs of patients at all times, either directly or indirectly. The section also establishes requirements

and a process for using volunteer services. The Department respectfully requests the committee to remove from subsection 2 “identify and” and “, care plan accordingly, provide oversight related to care, and review and document the patient’s individual needs and care provided” from the proposed rule.

**Section 33-03-35-15** is created to require a facility to develop, adopt, and implement a statement of the rights and responsibilities of hospice patients and members of the hospice patient’s family.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.
9. The anticipated fiscal impact resulting from implementation of the proposed amendments is expected to be minimal as the Department has built in plain review, licensure, and renewal fees to cover the expenses of the oversight to the Department.
10. A constitutional takings assessment was prepared and is attached to this report.
11. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Bridget Weidner  
Director, Health Facilities  
North Dakota Department of Health and Human Services  
March 3, 2023

**SUMMARY OF COMMENTS RECEIVED  
REGARDING PROPOSED CREATION OF  
N.D. ADMIN. CODE CHAPTER 33-03-35  
RESIDENTIAL END-OF-LIFE FACILITY REGULATION**

The North Dakota Department of Health and Human Services (the Department) held a public hearing on Tuesday, December 20, 2022, in Bismarck, ND, concerning the proposed creation of N.D. Administrative Code chapter 33-03-35, Residential End-of-Life Facility Regulation.

Written comments on these proposed amendments could be offered through 5:00 p.m. on Friday, December 30, 2022.

Six individuals attended the public hearing. One provided a comment from notes, a copy of which was provided. One additional written comment was received within the comment period. The commentors were:

1. Jeff Ubl and Kilee Harmon, Gaia Home, PO Box 4244, Bismarck, ND 58502-4244
2. Pamela Mack, Protection & Advocacy Project, 400 E Broadway, Suite 409, Bismarck, ND 58501-4071

**SUMMARY OF COMMENTS**

**Comment:** During the 2021 legislative session, S.B. 2226 was passed and created a new chapter of Century Code related to residential end-of-life facilities. The bill specifically directed the Department to adopt administrative rules for operation of residential end-of-life facilities in consultation with stakeholders. This action was appreciated because it encouraged feedback throughout the rulemaking process instead of limiting it to the open comment period.

On behalf of the below-listed Gaia Home stakeholders, we support the proposed administrative rules as written. As a general comment, we hope the Department will monitor participation in this program to encourage both small and large-scale facilities. Our hope is if the Department sees an entry barrier to small facilities due to the cost of an initial application they will consider fee-waivers or other provisions to encourage facilities of all sizes.

Once again, thank you and the Department for your work on these proposed rules. Gaia Home appreciates the opportunity to provide input during the rulemaking process and looks forward to working with the Department in the future.

**Response:** The Department appreciates the comment.

**LEGAL**

**Comment:** On behalf of the Protection & Advocacy Project (P&A), please accept these comments to the proposed amendment to N.D. Administrative Code chapter 33-03-35; Residential End-of-Life Facility Regulation.

Section 33-03-35-04 – Governing body – This section of the administrative code outlines the assurances that the governing body will be responsible for relative to patient care. P&A recommends that a section be added as follows: The governing body shall ensure that staff and volunteers are trained on abuse, neglect, and exploitation; and mandatory reporting requirements.

Section 33-03-35-04(7)(i)(3) – This sub-section of the administrative code identifies a notification to the hospice program when there is a need to transfer a patient from the hospice program. P&A recommends that further language be added to ensure clarity regarding the type of situation that would warrant a transfer. It is also recommended that language be added regarding a patient's appeal rights should there be a disagreement with an action taken by the Department.

Section 33-03-35-15 – Patient and family rights – This section of the administrative code addresses the rights and responsibilities of patients and their family members. P&A recommends that this section also include thorough documentation of discussion regarding the full array of services available within the community to ensure that people can remain living in their home and/or a setting of their choice and receive services to support their end-of-life care. This is consistent with the Department of Justice settlement agreement and the informed choice in the Department's person-centered services model. This is particularly important to ensure that the states' limited resources continue to be available for cost-effective community-based programs.

P&A also recommends that the capacity of a End-of-Life facility be limited to small numbers to ensure that privacy, dignity, and respect can be maintained during this difficult time. This is also a priority of the Protection & Advocacy Project and the need to ensure that people with disabilities have personal choice of services and that this model of care is utilized as a last resort.

**Response:**

Regarding Section 33-03-35-04 - Governing body comment: The Department believes the rules cover this request as training for competent staff includes training regarding abuse, neglect, and exploitation, and the mandatory reporting requirements.

Regarding Section 33-03-35-04 (7)(i)(3) comment: The Department does not feel we should outline the type of situations that would warrant a transfer of a hospice patient. Situations will

be different for each patient and facility; and we feel this should be left to facility, hospice, patient, and family discretion. The Department is licensing the facility, so adding appeal rights language for a patient should there be a disagreement with an action taken by the Department is not necessary. This provision requires the facility to immediately notify the hospice program if a need to transfer a patient from the facility occurs.

Regarding Section 33-03-35-15 – Patient and family rights comment: The Department believes discussions about services available within the community to ensure that people can remain living in their home or a setting of their choice and receive services to support their end-of-life care is a discussion between the licensed hospice provider that does not need to be part of the licensing requirements of this facility type. Identifying community resources is a requirement of the licensed hospice provider as per section 33-03-15-05 of the North Dakota Administrative Code.

Regarding the comment regarding the capacity of the facility be limited to small numbers to ensure privacy, dignity, and respect, the Department does not believe there is evidence to suggest a larger facility cannot adequately ensure privacy, dignity, and respect.

Prepared by:

Jonathan Alm  
Legal Division  
N.D. Dept. of Health and Human Services

In Consultation with: Bridget Weidner, Health Facilities

cc: Tim Wiedrich, Health Response and Licensure  
Bridget Weidner, Health Facilities  
Kelly Beechie, Health Facilities  
Karla Aldinger, Life Safety and Construction





North Dakota Health and Human Services  
600 East Boulevard Ave  
Bismarck, ND 58501

RE: Proposed Admin. Rules. Ch. 33-03-35. Residential End-Of-Life Facility Regulation

Dear Sir/Madam:

During the 2021 legislative session, S.B. 2226 was passed and created a new chapter of Century Code related to residential-end-of-life facilities. The bill specifically directed the Department to adopt administrative rules for operation of residential end-of-life facilities in consultation with stakeholders. This action was appreciated because it encouraged feedback throughout the rulemaking process instead of limiting it to the open comment period.

On behalf of the below-listed Gaia Home stakeholders, we support the proposed administrative rules as written. As a general comment, we hope the department will monitor participation in this program to encourage both small and large-scale facilities. Our hope is if the Department sees an entry barrier to small facilities due to the cost of an initial application they will consider fee-waivers or other provisions to encourage facilities of all sizes.

Once again, thank you and the Department for your work on these proposed rules. Gaia Home appreciates the opportunity to provide input during the rulemaking process and looks forward to working with the Department in the future.

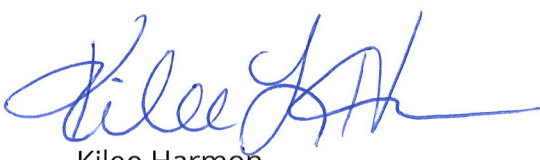
Best Regards,



Jeff Ubl  
Board Chair

Julie Schwab  
Board Secretary

Denise Dockter-Kambeitz  
Board of Director



Kilee Harmon  
Executive Director

Kristie Rants  
Board Treasurer

Terry Rockstad  
Founding Benefactor



Rosanne Schmidt  
Operations Advisory Group Member

Vern Dosch  
Operations Advisory Group Member  
Campaign Committee Member

Mylynn Tufte  
Operations Advisory Group Member

Scott Russell  
Campaign Committee Member

Melanie Carvell  
Campaign Committee Member

Judy Maslowski  
Campaign Committee Member

R.J. Pathroff  
Operations Advisory Group Member

Jeff Essler  
Operations Advisory Group Member

Chad Wachter  
Campaign Committee Member

Renee Daffinrud  
Campaign Committee Member

Gary Miller  
Campaign Committee Member



## Protection & Advocacy Project

400 East Broadway, Suite 409

Bismarck, ND 58501-4071

Phone: (701) 328-2950 Fax: (701) 328-3934

**RECEIVED**

DEC 21 2022

**HHS – Legal**

December 15, 2022

Rules Administrator  
Department of Human Services  
State Capitol-Judicial Wing  
600 E. Boulevard Avenue  
Bismarck, ND 58505-0250

TO WHOM IT MAY CONCERN:

On behalf of the Protection & Advocacy Project (P&A), please accept these comments to the proposed amendment to N.D. Administrative Code chapters 33-03-35; Residential End-of-Life Facility Regulation.

Section 33-03-35-04 – Governing body – This section of the administrative code outlines the assurances that the governing body will be responsible for relative to patient care. P&A recommends that a section be added as follows: The governing body shall ensure that staff and volunteers are trained on abuse, neglect, and exploitation; and mandatory reporting requirements.

Section 33-03-35-04 (7)(i)(3) – This sub-section of the administrative code identifies a notification to the hospice program when there is a need to transfer a patient from the hospice program. P&A recommends that further language be added to ensure clarity regarding the type of situation that would warrant a transfer. It is also recommended that language be added regarding a patient's appeal rights should there be a disagreement with an action being taken by the Department.

Section 33-03-35-15 – Patient and family rights – This section of the administrative code addresses the rights and responsibilities of patients and their family members. P&A recommends that this section also include thorough documentation of discussion regarding the full

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array of services available within the community to ensure that people can remain living in their home and/or a setting of their choice and receive services to support their end-of-life care. This is consistent with the Department of Justice settlement agreement and the informed choice in the Department's person-centered services model. This is particularly important to ensure that the states' limited resources continue to be available for cost-effective community-based programs.

P&A also recommends that the capacity of a End-of-Life facility be limited to small numbers to ensure that privacy, dignity, and respect can be maintained during this difficult time. This is also a priority of the Protection & Advocacy Project and the need to ensure that people with disabilities have personal choice of services and that this model of care is utilized as a last resort

Thank you for your consideration of these comments. If you have any questions, you are welcome to contact me at [pmack@nd.gov](mailto:pmack@nd.gov) or by phone at (701) 328-2950.

Sincerely,

A handwritten signature in cursive script that reads "Pamela Mack".

Pamela Mack  
Director of Advocacy Services

c: Veronica Zietz, P&A Executive Director



STATE OF NORTH DAKOTA  
**OFFICE OF ATTORNEY GENERAL**  
www.attorneygeneral.nd.gov  
(701) 328-2210

Drew H. Wrigley  
ATTORNEY GENERAL

OPINION

January 27, 2023

Mr. Christopher D. Jones, Exec. Dir.  
Department of Health & Human Services  
600 E. Boulevard Ave., Dept. 325  
Bismarck, ND 58505-0250

Dear Mr. Jones,

The Office of Attorney General has examined the proposed new N.D.A.C. ch. 33-03-35 concerning residential end-of-life facility regulation, along with the notice of the proposed rules, the publication of that notice, and the filing of that notice with the Legislative Council. This office has also determined that 1) a written record of the agency's consideration of any comments to the proposed rules was made, 2) a regulatory analysis was issued, 3) a takings assessment was prepared, 4) a small entity regulatory analysis and an economic impact statement were prepared, and 5) the proposed rules are within the agency's statutory authority.

These administrative rules are in substantial compliance<sup>1</sup> with N.D.C.C. ch. 28-32 and are hereby approved as to their legality. Upon final adoption, these rules may be filed with the Legislative Council.

Sincerely,

A handwritten signature in blue ink, appearing to read "Drew H. Wrigley".

Drew H. Wrigley  
Attorney General

cc: Liz Fordahl, Legislative Council

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<sup>1</sup> The Department of Health & Human Services requested publication of an abbreviated Notice of Intent to Adopt Administrative Rules and Notice of Public Hearing (Notice) in each official county newspaper in a timely manner. However, publication of the hearing notice in the Beulah Beacon did not allow 20 days between the date of publication and the hearing. All other hearing notices allowed at least 20 days between the publication date and the hearing date.

## MEMORANDUM

**TO:** Jonathan Alm, Legal Division

**FROM:** Bridget Weidner, Director, Health Facilities Unit

**RE:** Regulatory Analysis of Proposed North Dakota Administrative Code Chapter 33-03-35

**DATE:** October 18, 2022

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed creation of North Dakota Administrative Code Chapter 33-03-35. The new rules are anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

### Purpose

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This impact statement pertains to proposed creation of N.D. Admin. Code Chapter 33-03-35, in response to 2021 Senate Bill No. 2226. Federal law does not mandate the proposed rules.

### Classes of Persons Who Will be Affected

The classes of person who will most likely be affected by these rules are:

- Residential End-of-Life Facilities in the State of North Dakota
- Individuals receiving residential end-of-life services through a residential end-of-life facility in the State of North Dakota

### Probable Impact

The proposed amendments may impact the regulated community as follows:

- Residential End-of-Life Facilities (which is a new facility type in North Dakota) will be required to be licensed in North Dakota and follow the requirements in N.D. Admin. Code Chapter 33-03-35.

### Probable Cost of Implementation

The cost to the state should be minimal as the facility will be required to submit payment for plans review, licensing, and renewal fees.

### Consideration of Alternative Methods

No alternative methods of achieving the purpose of the proposed rules were identified and to ensure compliance with legislative intent regarding 2021 Senate Bill No. 2226.

## **M E M O R A N D U M**

**TO:** Jonathan Alm, Legal Division

**FROM:** Bridget Weidner, Director, Health Facilities Unit

**DATE:** October 18, 2022

**SUBJECT:** Small Entity Regulatory Analysis Regarding Proposed Creation of N.D. Admin. Code chapter 33-03-35.

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The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed creation of N.D. Admin. Code chapter 33-03-35 in response to 2021 Senate Bill No. 2226. Federal law does not mandate the proposed rules.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The only small entities affected by these proposed rules are residential end-of-life facilities within the State of North Dakota. Less stringent requirements were not considered as the development of these rules was undertaken at the request of the industry and in response to 2021 Senate Bill No. 2226.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

The development of these rules was undertaken at the request of the industry. The establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered. The rules do not establish stringent schedules or deadlines.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The development of these rules was undertaken at the request of the industry. The consolidation or simplification of compliance or reporting requirements for small entities was not considered as the requirements set forth in the proposed rules are minimal and are to ensure proper health and safety of patients.



#### 4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

The development of these rules was undertaken at the request of the industry. The consolidation or simplification of compliance or reporting requirements for small entities was not considered. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

#### 5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rules

The requirements of the proposed rules are applicable to all residential end-of-life facilities and are a result of 2021 Senate Bill No. 2226. The proposed rules do permit the Department to waive licensure requirements for specified periods of time provided compliance with the requirement would result in an unreasonable hardship upon the facility and the lack of compliance does not adversely affect the health and safety of patients.

## **M E M O R A N D U M**

**TO:** Jonathan Alm, Legal Division

**FROM:** Bridget Weidner, Director, Health Facilities Unit

**DATE:** October 18, 2022

**SUBJECT:** Small Entity Economic Impact Statement Regarding Proposed Creation of N.D. Admin. Code chapter 33-03-35, residential end-of-life facility regulation.

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed creation of N.D. Admin. Code chapter 33-03-35, residential end-of-life facility regulation. The proposed creation of chapter 33-03-35 is a result of 2021 Senate Bill No. 2226. The proposed rules could have an adverse economic impact on small entities.

### 1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed rules are residential end-of-life facilities within the State of North Dakota. There are no other small entities subject to the proposed amendments.

### 2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are unknown and will vary per facility depending on the building and the number of patients served.

### 3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule is unknown. We do not know the amount the facility will charge for the care provided. There will be a potential benefit to small entities that become a residential end-of-life facility as they will be able to charge for the care provided.

### 4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be minimal as we have built in plan review, licensing, and renewal fees to cover the expenses of the oversight to the Department.

## 5. Alternative Methods

No less intrusive or less costly alternative method of achieving the purpose of the proposed rules was identified. The proposed rules are a result of 2021 Senate Bill No. 2226.

## FISCAL IMPACT

The probable effect of the proposed rule on state revenues is expected to be minimal as the Department has built in plan review, licensing, and renewal fees to cover the expenses of the oversight to the Department.

**TAKINGS ASSESSMENT**

concerning proposed creation of N.D. Admin. Code chapter 33-03-35.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.
3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 18th day of October, 2022.

by: 

N.D. Dept. of Health and Human Services

**LEGAL**