

Testimony
Administrative Rules Committee
December 12, 2013
North Dakota Department of Health

Chairman Devlin and members of the Administrative Rules Committee, my name is David Glatt, Chief of the Environmental Health Section for the North Dakota Department of Health. I am here today to provide testimony regarding **Chapter 33-21-02 Servicing of Septic or Holding Tanks, Privies, or Portable Restrooms**.

My testimony will address the rule revision process by addressing the following questions:

1. *Did the proposed rules result from statutory changes made by the Legislative Assembly?*

Due to the increase in sewage handling and land disposal concerns resulting from increased development in western North Dakota, the existing septage handling and disposal law and rule was determined to be inadequate to protect public and environmental health. In response, SB 2308 was passed, repealing **NDCC 23-19 Cesspools, Septic Tanks and Privies Regulation** and moving regulatory authority to **NDCC 61-28 Control, Prevention and Abatement of Pollution of Surface Waters**. This action allowed for the regulation of septage handling under the same law which currently regulates other waste handling and disposal activities such as municipal wastewater, animal feeding operations and various industries. This legislative action will result in the standardization of the regulation and enforcement of waste handling and disposal activities, improving public health and environmental protection.

2. *Are the rules related to any federal statute or regulation?*

The proposed rules as identified in Chapter 33-21-02 are not the direct result of any federal statute or regulation.

3. Description of the rulemaking procedure to include public notice and hearings.

The proposed repeal of NDAC 33-21-01 and adoption of NDAC Chapter 33-21-02 went through the following approval process compliant with state law prior to being presented to the Administrative Rules Committee:

- Notification of the State Health Council of the Department's intent to repeal old and adopt new regulations.
- Presented to the Water Pollution Control Board for review and approval.
- Notice to the public of the intent to repeal current and adopt new Rules and opportunity to provide public comment.
 - Public Notice in official county newspapers.

- Public Notice posted on the Department’s website.
 - E-mail notification to 193 interested parties through the Health Department – Environmental Health Section Public Notice List Serve.
 - Letters of notification of the Department’s intent sent to licensed septic tank haulers, master plumbers, public health units and legislators who supported the bill. (September 11, 2013)
- Completion of a public hearing and comment period. (September 17, 2013 through October 21, 2013) Public hearing was conducted on October 10, 2013, in Bismarck, N.D.
 - Provided an opportunity for regulated entities to participate in a conference call to provide input on the proposed rules. (September 24, 2013)
 - Adoption of the final draft rules by the State Health Council. (October 25, 2013)
 - Received approval of the final draft rules by the Attorney General. (October 31, 2013)
4. During the public hearing and comment period the following comments were received:
- **Comment:** Concern was expressed over how Class I and Class II operators would have different requirements for wintertime application giving Class II operators a competitive advantage.
Answer: The Department agreed with the comment and required that all licensed operators comply with the same application and handling requirements during the winter.
 - **Comment:** The requirement for a screening of septage prior to application could pose an operational problem during the winter.
Answer: The Department noted the need to prohibit litter from being applied to land, but also noted operational problems created from too prescriptive of a screening standard. The Department modified the rule to be more of a performance standard to read as follows: “Land application sites shall be maintained free of litter.”
 - **Comment:** The added cost of either an air or hydraulic valve for controlling the discharge is prohibitive and may even cause more issues with the discharge, such as freezing up.
Answer: The Department agreed and modified the proposed rule language to address a performance standard to read: “The discharge from the servicing unit shall be controlled so that pooling or ponding of septage during land application does not occur.”
 - **Comment:** There is no reason to remove the master plumber exemption for obtaining a septic pumper license.
Answer: The Department believes that the proper handling and disposal of septic waste is crucial in the protection of public health and the environment. Master

plumbers are only required to obtain a license when the handling and disposal of wastewater is required to complete a project.

- **Comment:** The waste issues in one part of the state are not the same in other parts of the state and the regulations should be done on a county-by-county basis.

Answer: Although the volumes of waste transported and disposed/treated may differ from county to county, the potential for adverse environmental and public health impacts are the same for improperly treated and disposed waste material. In this case, the Department believes that uniform regulation that applies to all areas of the state provides consistent regulation, less confusion of what regulations apply and where, and consistent enforcement. In addition, the regulations do consider the size of the operation and allow for increased monitoring of larger or Class I operations over smaller Class II operations. Class II operators have reduced reporting requirements and oversight by the Department.

- **Comment:** What is the reason for signage on trucks? Why not just put the septic permit number on the truck instead of the company name?

Answer: New plates are assigned once every five years for display on the truck. Because these numbers can change, requiring a number to be painted on a truck once every five years could be problematic and costly. It is the Department's opinion that proper vehicle/owner identification coupled with license plate display is easily implemented and cost effective.

Although the Department did not receive comment on the modification to the licensing fee schedule, I believe it is important to briefly explain the change in the table on the next page:

CURRENT AND PROPOSED FEE STRUCTURE FOR SEPTIC SERVICING COMPANIES

CURRENT FEE STRUCTURE				PROPOSED FEE STRUCTURE		
In - State		Out - of - State		Permit Holder		
New	Renewal/ Unit Unit Fee	New	Renewal/Unit Unit Fee	Application	Unit Fee	Renewal/Unit
\$50.00	\$15.00	\$100.00	\$15.00	\$100.00	\$50.00	\$50.00

EXAMPLE

New company with one truck

				<u>Renewal</u>		
Current Fee	Unit Fee	Surety Midrange (est.)	Total	Unit Fee	Surety	Total
In-State	\$50.00	\$87.50	\$137.50	\$15.00	\$87.50	\$102.50
Out-of-State	\$100.00	\$87.50	\$187.50	\$15.00	\$87.50	\$102.50

				Renewal	
Proposed Fee	App.	Unit Fee	Total	Unit Fee	Total
Company	\$100.00	\$50.00	\$150.00	\$50.00	\$50.00

Surety Bond premium is collected by an insurance company, not the State.

CURRENT FEES - 2013

Number of Companies	Number of Units	Fees Collected	Surety Bond Yearly Premium Range		
			Minimum	Average	Maximum
184	407	\$8,475	\$50.00	\$87.50	\$125.00
			\$9,200.00	\$16,100.00	\$23,000.00

PROPOSED FEES AS RENEWALS

Number of Companies	Number of Units	Fees Collected	NO Surety Bond
184	407	\$20,350	

5. The approximate cost of giving public notice, holding a hearing, developing and adopting the rules was \$2,273.
6. The proposed rules have been developed to address the evolving science related to raw wastewater disposal practices in addition to the increase in the generation and disposal of raw wastewater from small or transient sources in the state. Much of the increased activity has been attributed to development of oil resources; however, the issue of treatment and disposal is an issue that is addressed statewide. The existing law and rules, which were originally adopted in the 1950's, needed to be updated to address the volume of waste generated in the state, treatment methods and to make them consistent with other activities in the state that regulate wastewater treatment and disposal. The significant amendments identified in the proposed rule are as follows:
 - a. Separated servicers into two classes (i.e., Class I and Class II). Class I are septage servicer operations that have more than two hauling units and Class II includes operations of two hauling units or less. Class I servicers also include an operation that hauls the most concentrated waste such as that found in portable restrooms. Reporting requirements are increased for Class I operators.
 - b. Increases the license fee, but eliminates the surety bond requirement.
 - c. Requires continuing education for owners, operators and employees.
 - d. Describes the equipment needed for proper land application.
 - e. Identifies land characteristics needed for the proper application of raw sewage.
 - f. Identifies acceptable pathogen reduction methods as well as vector reduction methods when land application of septage is practiced.
 - g. Requires records be kept on the source and location of disposal of the septage.
 - h. Requires reporting of spills.
7. A Regulatory Analysis was prepared. There were no requests for the analysis. A copy of the analysis is attached to this testimony.
8. A Small Entity Analysis was prepared and is attached for your review.
9. The rules will have a minor impact on the state revenues and expenditures as the program already exists and continues to operate with existing staff and budget.
10. A Constitutional Takings assessment was prepared and has been attached for your review.
11. These proposed rules were not adopted as emergency rules.

This concludes my testimony and I will answer any questions you may have relating to this matter.

Rule Revision Analysis and Assessment

1. Background

The Department of Health has had rules in place regulating the servicing of cesspools, septic tanks, privies(commonly known as septic pumpers) since approximately 1955. Senate Bill (SB) 2308 enacted in the 2013 legislative session moved authority from North Dakota Century Code (NDCC) 23-19 to NDCC 61-28 in order to standardize the rules governing disposal of wastewater. Wastewater from point sources, such as municipalities, industries, Concentrated Animal Feeding Operation and others is regulated under NDCC 61-28. Septic servicers will now also be regulated under that chapter. These rules implement the 2013 legislation and specify the requirements septic services must follow to protect public health and the environment. The significant changes made by the proposed rule include:

- Separating servicers into two classes, with which the larger companies and those hauling the most concentrated waste e.g. portable restroom waste, having additional reporting requirements for the land application of waste.
- Increases the licensing fee, but removes the requirement for a surety bond
- Requires continuing education for owners, operators and employees
- Describes the equipment needed for proper land application, including
 - in cab control for the discharge valve,
 - method for evenly spreading septage
 - screen to catch trash and debris
- Details appropriate for land application
 - Prohibited in areas where it could enter water
 - Maximum slope
 - Setback distances from residences, wells and public areas
 - Restrictions on snow covered or frozen ground
- Practices to reduce pathogens and vectors in land applied septage
- Requires records be kept on the source and the disposal of septage
- Requires spills to be reported

The vector and pathogen reduction methods in the proposed rules are equivalent to federal requirements, reducing confusion and preventing a potential conflict where a septic servicer could be in compliance with state rules, but in violation of federal rules.

2. Regulatory Analysis

a. Classes or persons likely to be affected by the proposed rules

The proposed rule will affect primarily septic system servicers. The department currently licenses 177 separate companies that operate 391 units. This rule will also affect the general public by protecting their health and water resources. A small subset of master plumbers that also service septic systems will be

affected, since they currently are exempted from the current rules, but will now need a license.

b. Probable impact, including economic impact, of the proposed rules

i. Recordkeeping and reporting

There will be little additional economic impact as businesses already track the source for billing purposes, they will need to add an additional data set to their existing records. The reporting requirements will be conducted at the same time as the license renewal, reducing the need for a separate report.

ii. Land application requirements

The restrictions on land application may require a longer haul to reach acceptable land application sites or wastewater treatment facilities.

iii. Equipment modifications

Some servicers that land apply may need to upgrade their servicing units to provide a splash plate, an in cab controlled discharge valve and the ability to screen the material before mixing with the soil. The cost will vary depending on the unit, but many servicers may be able to make the required modifications themselves. This is a one-time cost that may be spread out over the life of the servicing unit.

iv. Application and License fee

There will be an application fee of \$100 and a \$50 fee for each vehicle licensed. The renewal fee will increase to \$50 per unit from \$15 but the servicer will no longer be required to hold a surety bond. There will no longer be a distinction between in and out-of-state license fees.

c. Cost of implementation and enforcement

The increased cost of implementation and enforcement is expected to equal the increased revenue from the application and license fee.

d. Alternative methods of achieving the purpose of the proposed rule

i. The department considered less reporting, however the contacts and

communication between the licensee and the department encourage compliance with the rule and allow the department to note small problems before they become large issues with environmental damage.

ii. The department considered continuing the performance based standards for

land application, but felt that the regulated community would prefer the certainty provided by more specific requirements rather than the existing "shall not endanger the purity of any water" requirement.

iii. The department also considered a performance standard instead of the

equipment requirement, but chose to regulate the equipment to provide

certainty, as performance can be affected by other factors, such as weather conditions and the source of the septage.

- iv. The department considered keeping the surety bond requirement, but felt that the utility of the bond was not worth the extra expense and effort.

3. Takings Assessment

- a. Likelihood that the proposed rule may result in a taking
The rule is not likely to result in a taking as it does not preclude the use of land for septage application, but regulates how that application is conducted.
- b. Purpose of the proposed rule
The purpose of the proposed rule is to protect water and land resources from the impacts of improper septage disposal and protect the public from health impacts of improperly disposed septage.
- c. Why the rule is necessary and why no alternative is available
The rule is necessary due to increased volume of septage being generated and recent incidents of improper land application that endangered our water resources.
- d. Potential cost
There is no potential cost as there will be no regulatory taking
- e. Source of payment
There is no source identified as there will be no regulatory taking
- f. Benefits exceed costs
The benefits to the public exceed any potential compensation costs, as there is no regulatory taking.

4. Small Entity Regulatory Analysis

- a. Ways to minimize adverse impacts
 - i. Less stringent compliance or reporting requirements
The department separated septic system servicers into two classifications, with reduced reporting requirements for the smaller servicers
 - ii. Less stringent schedules or deadlines
The department proposes a compliance deadline for the in cab control valves later than the effective date of the rule. Less stringent deadlines were considered, however with the increase in wastewater production and the increase in the number of licensed units, the department felt extending the deadlines for compliance with requirements to protect public health and the environment was not prudent.
 - iii. Consolidating or simplifying compliance or reporting requirements
The reporting requirements were simplified to require reporting on the same schedule as the annual license renewal.
 - iv. Establishing performance standards that replace design or operational standards

Refer to sections 2.d.ii and 2.d.iii

v. Exempting small entities from all or part of the rules' requirements

The department divided septic system servicers into two classes, with the smaller of the two classes being exempt from some reporting requirements and pre approval for land application sites.

5. Small Entity Economic Impact Statement

a. Small entities that may be subject to the rule

Most septic servicers would be considered small entities.

b. Administrative or other costs

The costs to small entities would consistent with the costs identified in 2.b.

c. Cost and benefit to private persons and consumers

The costs of compliance with this rule would likely be borne by the septic servicers themselves. The benefits to the consumers and private persons are largely intangible, such as protection of health and water resources.

d. Probable effect on state revenues

The increased application and license fee will likely increase state revenues by \$29,290.00

e. Less intrusive or less costly methods

The department strives to balance the protection of our public resources with the costs on individual entities. The propose rule balances the oversight and restrictions needed to protect our water and the public health, while trying to provide regulatory certainty and a minimum cost of compliance. The department has and will use a common sense approach to the regulation of septic servicers.

6. Fiscal Note

a. Affect on revenue

Revenue will increase by \$29,290.00

b. Affect on expenditures

The department will use the additional revenue to implement the program.