



North Dakota Insurance Department

Adam Hamm, Commissioner

MEMORANDUM

TO: Legislative Council's Administrative Rules Committee

FROM: Jeff Ubben, General Counsel *Jeff Ubben*

DATE: December 12, 2013

SUBJECT: Adoption of Administrative Rules (January 2014 Supplement)

- Boilers (45-12-01, 45-12-02, 45-12-03, 45-12-05, 45-12-09, 45-12-10)

Chairman Devlin and members of the Administrative Rules Committee, I am Jeff Ubben, General Counsel for the North Dakota Insurance Department.

As requested, the following addresses the Administrative Rules Committee's questions regarding recent amendments to Title 45 of the North Dakota Administrative Code adopted by the North Dakota Insurance Department.

The committee requested testimony concerning the following:

1. **Whether the rules resulted from 2013 statutory changes made by the Legislative Assembly.**

Answer: The rules did not result from statutory changes made by the Legislative Assembly.

2. **Whether the rules are related to any federal statute or regulation.**

Answer: The rules were not related to any federal statute or regulation.

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.**

Answer: Notice of the rulemaking and the public hearing was published in all county newspapers as required by law. The Insurance Department also uses a basic mailing list to provide notice of each of its rulemaking projects. Additionally, the Department

constructs relevant mailing lists for specific rulemaking. A public hearing was held on September 4, 2013, at the State Capitol, Bismarck, North Dakota. Oral comments as well as any written comments that have been received are summarized along with any response to the comments that may seem appropriate and a redrafted rule incorporating any change occasioned by the comments.

4. **Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules.**

Answer: No written or oral concerns, objections, or complaints for agency consideration were submitted.

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.**

Answer: The Notice of Hearing was published once in all North Dakota official county newspapers which cost approximately \$1,737 for the rules which are before the committee today. Approximately 200 notices were sent by email to interested parties at no cost. Approximately 100 notices were sent by post office mail and the postage charge for this mailing was approximately \$41.

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

Answer: The purpose of the proposed amendments was to adopt the latest American Society of Mechanical Engineers (ASME) code and National Board Inspection Code, to correct incorrect wording in the current rule, to add "Repairs and Alterations" to shop inspections and shop reviews, to allow backflow preventers approved by the State Plumbing Board instead of the State Plumbing Code, to change to 4 from 4.5 for the factor of safety for nonstandard boilers, and to update the ASME Code and national Board Inspection Code to the 2013 edition for unfired pressure vessels. No comments were received in response to these rules.

7. **Whether a regulatory analysis was required by N.D.C.C. § 28-32-08 and whether a regulatory analysis was issued.**

Answer: A Regulatory Analysis was not required as the proposed rules are not expected to have an impact on the regulated community in excess of \$50,000.

8. **Whether a regulatory analysis or economic impact statement for small entities was required by N.D.C.C. § 28-32-08.1 and whether that regulatory analysis or impact statement was issued.**

Answer: A Small Entity Economic Impact Statement and Small Entity Regulatory Analysis were prepared and a copy is attached.

9. **Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency.**

Answer: A Statement Concerning Absence of Fiscal Effect of Proposed Rules was prepared and a copy is attached.

10. **Whether a constitutional takings assessment was prepared as required by N.D.C.C. § 28-32-09.**

Answer: A Takings Assessment Concerning Proposed Rules was prepared and a copy is attached.

11. **If these rules were adopted as emergency (interim final) rules under N.D.C.C. § 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.**

Answer: The rules were not adopted as emergency rules.

I hope that this response adequately addresses the concerns of the committee. I will be happy to answer any questions that you might have.

JU/njb
Attachments
cc: Adam Hamm, Commissioner

STATE OF NORTH DAKOTA
BEFORE THE INSURANCE COMMISSIONER

In the Matter of the Promulgation	)	SMALL ENTITY ECONOMIC IMPACT
of Proposed Rules Regarding Boilers.	)	STATEMENT AND
	)	SMALL ENTITY REGULATORY
	)	ANALYSIS
)	
	)	FILE NO. RU-13-411

Small Entity Analysis for N.D. Admin. Code Article 45-12 – Boilers

N.D.C.C. § 28-32-08.1 requires that an agency prepare a regulatory analysis and an economic impact statement of the impact of the rule changes on a small entity. "Small entity" is defined by state law to include small businesses, small organizations, and small political subdivisions. *Id.* "Small business" is defined to mean a business entity, including its affiliates, which is independently owned and operated and employs fewer than 25 full-time employees; or has gross annual sales of less than \$2,500,000. *Id.* "Small organization" means any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. *Id.* "Small political subdivision" means a political subdivision with a population of less than 5,000. *Id.*

A. Small Entity Economic Impact Statement

1. Small entities subject to the proposed rule

The small entities that may possibly be subject to these proposed rules are individuals who operate boilers and the individuals who inspect boilers that meet the statutory definition of "small entity".

2. Administrative and other costs required for compliance with the proposed rule

The administrative and other costs required for compliance with the proposed rules are expected to be minimal. The rules adopt the latest American Society of Mechanical Engineers (ASME) Code and National Board Inspection Code, correct incorrect wording in the current rule, add "Repairs and Alterations" to shop inspections and shop reviews, allow backflow preventers approved by the State Plumbing Board instead of the State Plumbing Code, change to 4 from 4.5 for the factor of safety for nonstandard boilers, and update the ASME Code and National Board Inspection Code to the 2013 edition for unfired pressure vessels.

3. Probable cost and benefit to private persons and consumers who are affected by the proposed rules

It is probable that there will be no cost to private persons and consumers who are affected by the proposed rules. The probable benefits to private persons and consumers include furthering consumer protection by improved boiler inspections resources and updated codes.

4. Probable effect of the proposed rule on state revenues

The rules are not reasonably expected to have an effect on state revenues.

5. Any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule

The Commissioner considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. As previously noted, it is probable that the proposed rules will contain no cost to private persons and consumers who are affected by the proposed rules and that administrative and other costs for compliance with the proposed rule will be minimal to nil. The proposed rules are essentially an updating of various codes that are already used in the industry and which serve to modernize a current practice already familiar to the regulated community. In view of these circumstances, no less intrusive or less costly alternative methods were identified.

B. Small Entity Regulatory Analysis

1. Establishment of less stringent compliance or reporting requirements for small entities

Less stringent reporting requirements for small entities were considered and found not appropriate. Reporting requirements in the proposed rules are either carried over from the current version of the rule or are a codification of current practices familiar to the regulated community. Less stringent compliance requirements were also considered but they were not appropriate under these circumstances.

2. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities

The Commissioner considered less stringent schedules or deadlines where possible. Any and all schedules or deadlines set in the proposed rules have been set to be minimally stringent for all licensees regardless of size.

3. Consolidation or simplification of compliance or reporting requirements for small entities

To the extent possible, compliance or reporting requirements for small entities were simplified or made less onerous or made as streamlined as possible.

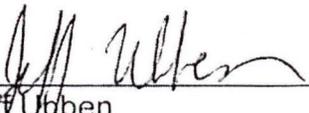
4. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule

Small entities were not given different operational standards to comply with than large entities. No design standards are presented in the proposed rules.

5. Exemption of small entities from all or any part of the requirements contained in the proposed rule

Small entities were not given different standards to comply with than large entities.

DATED this 18th day of July, 2013.



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STATE OF NORTH DAKOTA
BEFORE THE INSURANCE COMMISSIONER

In the Matter of the Promulgation)	STATEMENT CONCERNING
of Proposed Rules Regarding Boilers.	)	ABSENCE OF FISCAL EFFECT
	)	OF PROPOSED RULES
)	
	)	FILE NO. RU-13-411

The purpose of this statement is to fulfill the requirements of N.D.C.C. § 28-32-08.2 which provide that when an agency presents rules for Administrative Rules Committee consideration, the agency shall provide a fiscal note or a statement that the rules have no fiscal effect. After consulting with Bob Reetz, Chief Boiler Inspector for the North Dakota Insurance Department, the undersigned has determined that the proposed rules concerning Boilers (N.D. Admin. Code title 45-12) are not expected to have a fiscal effect on state revenues and expenditures during the 2013-2015 biennium.

DATED this 18th day of July, 2013.



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STATE OF NORTH DAKOTA
BEFORE THE INSURANCE COMMISSIONER

In the Matter of the Promulgation)	TAKINGS ASSESSMENT
of Proposed Rules Regarding Boilers.	)	CONCERNING
	)	PROPOSED RULES
)	
	)	FILE NO. RU-13-411

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 50 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 these proposed rules is to adopt the latest American Society of Mechanical Engineers (ASME) Code and National Board Inspection Code, to correct incorrect wording in the current rule, to add "Repairs and Alterations" to shop inspections and shop reviews, to allow backflow preventers approved by the State Plumbing Board instead of the State Plumbing Code, to change to 4 from 4.5 for the factor of safety for nonstandard boilers, and to update the ASME Code and National Board Inspection Code to the 2013 edition for unfired pressure vessels.

3. The reasons these proposed rules are necessary to substantially advance that purpose is because the rules would allow manufacturer and repair firms to use the latest codes as opposed to outdated codes and to make other common sense amendments to the rules. Without the proposed rules, a hardship on the manufacturers and repair firms would result and our current administrative rules on boilers would often go against common sense. Ultimately, without the proposed rules North Dakota would have a less than relevant set of rules that would be difficult to enforce. North Dakota might lose its regulatory effectiveness in the long run along with the trust and respect of those we deal with on code issues.

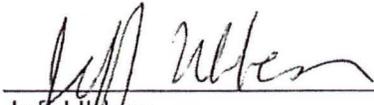
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the

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 July, 2013.



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