

ND Legislative Council  
Administrative Rules Committee  
March 11, 2014

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 Division of Air Quality of the Health Department. I am here to address changes to Article 33-15, Air Pollution Control found in pages 5-45. Peter Wax with the Division of Water Quality will address the water quality rule changes found in pages 46-93.

1. The Air Pollution Control 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 and be consistent with federal requirements. 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 November 12, 2013.

The rules were approved by the Air Pollution Advisory Council on December 12<sup>th</sup>; by the Attorney General on January 9<sup>th</sup> and by the State Health Council on February 11, 2014. The rules were submitted to the Legislative Council on January 13<sup>th</sup>.

4. During the public hearing, no oral comments were received. Late written comments were received from the U.S. Environmental Protection Agency. EPA provided one specific comment on a proposed change to 33-15-03-04.3. EPA indicated the proposed change would not eliminate their concerns with the current rule. The proposed change was withdrawn. EPA also urged the Department to revise several other sections of the rules that contain what they call a "Director's Discretion". These sections of rule were not the subject of this public comment period. The Department will review EPA's request and take any necessary action at a later date.

5. The approximate cost of giving public notice, holding a hearing, developing and adopting the rules is \$4,900.
6. The rule revisions updated State rules to be consistent with Federal rules and requirements. This included changes to the Standards of Performance for New Stationary Sources, Prevention of Significant Deterioration, Ambient Air Quality Standards, and Emissions 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. The rule changes will not significantly affect revenues or expenditures.
10. A Takings Assessment was prepared. A copy of the assessment is attached to my testimony.
11. These 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 33-15-03 -	Restriction of Emissions of Visible Air Contaminants
Chapter 33-15-04 -	Open Burning Restrictions
Chapter 33-15-06 -	Emissions of Sulfur Compounds Restricted
Chapter 33-15-12 -	Standards of Performance for New Stationary Sources
Chapter 33-15-15 -	Prevention of Significant Deterioration of Air Quality
Chapter 33-15-22 -	Emission Standards for Hazardous Air Pollutants for Source Categories
Chapter 33-15-23 -	Fees

#### 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 industries most affected are the industrial/commercial/institutional boilers, industrial/commercial incinerators and power plants.

#### 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, 3, 12, 15 and 22 are being made to be 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 changes to the other chapters are minor clarifications that are not expected to have any impact on regulated sources.

## **Probable Costs to the Department**

The revisions will not have a significant cost to the Department.

## **Alternative Methods Considered**

The changes to Chapters 1, 2, 3, 12, 15 and 22 are being made to be 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 other chapters are clarifications to the rules.

## **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 Federal Clean Air Act and the rules promulgated thereunder. The proposed rules will not limit the use of a 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 Chapters 3, 6 and 23 clarify existing rules or provide an additional test method.

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 or provide clarification of existing 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

The 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

The revision to Table 1 updates the annual standard for PM<sub>2.5</sub> to match the federal standard.

Chapter 33-15-03 - Restriction of Emission of Visible Air Contaminants

In Subsection 33-15-03-04.3, the change clarifies that any alternative visible emissions standard must be established in a federally enforceable permit. Therefore, this change does not make the rule more stringent than federal requirements. In Subsection 33-15-03-05.2, a federal test method is being added for determining compliance. This does not add any new requirements for a source, it just adds an additional compliance determination method.

#### Chapter 33-15-04 - Open Burning Restrictions

The change to Subdivision 33-15-04.2.a eliminates the reference to “public nuisance” and replaces it with the requirement that open burning cannot cause “air pollution.” This is consistent with State and federal requirements that compel the Department to prevent or abate air pollution.

#### Chapter 33-15-06 - Emissions of Sulfur Compounds Restricted

The change in Subsection 33-15-06-05.1 simply clarifies which sources have to submit excess emissions reports. It does not impose any new requirements.

#### 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 33-15-15 - 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 33-15-22 - 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 three additional standards. Therefore, the changes are no more stringent than federal requirements.

#### Chapter 33-15-23 - Fees

The change to this chapter does not impose any emission limits or requirements. It is a housekeeping change which eliminates the fees for minor sources that operate an emissions or ambient monitoring system.

### **V. NDCC 28-32-08.1 Small Entities Analysis**

#### **1. Regulatory 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. The other changes to the rules are clarifications that do not affect existing requirements or, reduce the effect on small entities.

## Explanation

### Chapter 33-15-01 - General Provisions

The baseline date for incorporation by reference is being updated. Therefore, the change is equivalent to federal requirements in 40 CFR 51.

### Chapter 33-15-02 - Ambient Air Quality Standards

The revision to table updates the annual standard for PM<sub>2.5</sub> to match the federal standard in 40 CFR 50.

### Chapter 33-15-03 - Restriction of Emission of Visible Air Contaminants

33-15-03-04.3 – The change clarifies that any alternative visible emissions standard must be established in a federally enforceable permit. This change is made to comply with the requirements of Section 110 of the Clean Air Act and 40 CFR 51.

33-15-03-05.2 – Adds a compliance determination method found in 40 CFR 60.

### Chapter 33-15-04 - Open Burning Restrictions

The change eliminates the requirement that open burning cannot cause a “public nuisance” and replaces it with a requirement that open burning cannot cause “air pollution.” The change was made to be consistent with 40 CFR 51 and NDCC 23-25-03.8. The change does not increase the stringency of current rules and should not change the effect on small entities.

### Chapter 33-15-06 - Emissions of Sulfur Compounds Restricted

The change clarifies that only sources that operate continuous emission monitors have to submit excess emissions reports. This clarification does not expand the number of sources covered by the rule and may reduce it. No small entities are affected.

### Chapter 33-15-12 - Standards of Performance for New Stationary Sources

The changes incorporate by reference rules from 40 CFR 60.

### Chapter 33-15-15 - Prevention of Significant Deterioration of Air Quality

The change updates the data for incorporation by reference of federal rules found in 40 CFR 52.21.

### Chapter 33-15-22 - Emission Standards for Hazardous Air Pollutants for Source Categories

The changes to this chapter incorporate by reference federal rules found in 40 CFR 63.

### Chapter 33-15-23 - Fees

The change to this chapter eliminates fees for minor sources that operate a continuous emissions monitor or ambient air quality monitoring site. No small entities are affected. If they were affected, it would reduce the burden on small entities.

## 2. Economic Analysis

None of the changes to the rules will have an economic impact on small entities. The new rules are mandated by federal law (see above analysis). Small entities will be subject to the rules whether the Department adopts them or not. There will be no additional cost to small entities by the Department adopting the new rules or changes to existing rules.

Based on the above review, a small entities analysis was not required.