

North Dakota Legislative Council  
Administrative Rules Committee  
March 11, 2014

Chairman Devlin and members of the Administrative Rules Committee, my name is Peter Wax, a scientist with the Environmental Health Section for the North Dakota Department of Health. I am here today to request approval of the amendments to the Standards of Quality for Waters of the State, N.D. Administrative Code Chapter 33-16-02.1.

In response to the committee's questions relating to the development and content of the rules, I provide the following:

- 1) The rules are not a requirement of statutory changes made by the Legislative Assembly.
- 2) The Standards of Quality for Waters of the State are required by Federal Statute 33 U.S.C. 1313(c). Pursuant to the requirements of the Clean Water Act, each state must develop and adopt water quality standards for the maintenance of beneficial uses of surface water. These standards must be reviewed and amended as necessary once every three years and are not considered final until approved by the U.S. Environmental Protection Agency (EPA). If water quality standards are not established by a state, the U.S. EPA has the authority to establish standards as appropriate.
- 3) The standards review and adoption process included the following notifications, hearings, and approvals:
  - September 6, 2013 - Notified State Water Pollution Control Board of intent to amend standards as part of the triennial review.
  - October 8, 2013 - Presented proposed amendments to water pollution control board for review.
  - October 14, 2013 - Notified Legislative Council of the intent to amend standards as part of the triennial review.
  - October 17, 2013 - Public Notice of Hearing.
  - December 2, 2013 - Held public hearing in Bismarck.
  - December 2 through 11, 2013 - Public Comment Period.
  - January 10, 2014 - Received favorable opinion from the Attorney General.

No comments were received during the public hearing. Written comments were received from the U.S. EPA, the State Water Pollution Control Board, and the N.D. Game and Fish Department. The department responded to all comments and made revisions to the rules as appropriate.

On January 30, 2014 (after the comment period), the department received an email indicating that a select number of the chemical registry numbers in the rules were not correct. In addition, a footnote numbering error was found in Table 1. Since time permitted, it was deemed prudent to correct these errors.

- February 11, 2014 - Health Council approved the amendments subject to a second Attorney General's opinion.
  - March 7, 2014 - Received second favorable opinion from the Attorney General.
- 4) Prior to, during, and after the public comment period, the department did not receive any objection or complaint on the proposed amendments to the rules. The department received five written comments from the U.S. EPA, six from the N.D. Game and Fish Department, multiple recommendations from the Water Pollution Control Board, one from the copper industry, and an email from a consulting firm.

The department received no verbal comments at the public hearing.

All applicable comments and recommendations received were related to improving the standards. U.S. EPA recommended the addition of aquatic life criteria for two pesticides; the department concurred and made the appropriate revisions. The N.D. Game and Fish Department recommended a seasonal average for the lake improvement goals; the department concurred and made the appropriate changes. The majority of the remaining comments were directed toward department processes, designations and numeric criteria development; to correct grammar and add clarification; and to update chemical registry numbers. The department reviewed these and made appropriate revisions.

- 5) The cost to provide Public Notice through publication in the appropriate newspapers totaled \$1,737.
- 6) The Clean Water Act requires the department to periodically review the water quality standards and update as appropriate. The review is necessary to ensure all designated beneficial uses of the state's waters are maintained. To be consistent with the federal requirements, the department proposes to make the following amendments:
- Reword the definition of recreation to more clearly define the difference between primary and secondary recreational waters.
  - Change the guideline for a lake restoration project from the nutrient-based criteria of 0.25 milligrams per liter (mg/L) of nitrates and 0.02 mg/L of phosphates to a growing-season chlorophyll-a average of 20.0 micrograms per liter (µg/L) to more accurately reflect lake condition.
  - Add acute and chronic aquatic life values for the pesticides Acrolein and Carbaryl of 3.0 µg/L and 2.1 µg/L, respectively, as recommended by U.S. EPA.
  - In Appendix II, add South Buffalo Gap Dam (Golden Valley County) as a Class 4 lake, Harmon Lake (Morton County) as a Class 3 lake, and reclassify Round Lake

(Kidder County) from a Class 3 to a Class 2 lake to accurately reflect the lake classification.

- In response to comments and as general housekeeping, revisions are proposed to improve grammar, provide clarity, and update references to the chemical registry numbers in Tables 1 and 2.
- 7) The proposed amendments are not expected to have an impact on the regulated community in excess of \$50,000. A copy of the regulatory analysis has been provided for the committee's review.
- 8) No small entities economic impact statement was completed. The federally mandated rules will not have an impact on small entities.
- 9) The proposed amendments are expected to have minimal or no additional fiscal effect on state or agency revenues and expenditures. A copy of the fiscal note has been provided for the committee's review.
- 10) A takings assessment was prepared and no adverse impacts were found. A copy of the assessment has been provided to the committee for review.
- 11) These rules are not being adopted as emergency rules pursuant to N.D.C.C. 28-32-03.

This concludes my testimony. I am available to answer your questions as they relate to the proposed amendments in the water quality standards.

**N.D.A.C. Chapter 33-16-02.1**  
**Standards of Quality of Waters of the State**  
**Fiscal Note and Regulatory Analysis**

**I. Fiscal Note**

**Background**

North Dakota Century Code (N.D.C.C.) §28-32-08.2, requires the North Dakota Department of Health to provide the Administrative Rules Committee with a fiscal note reflecting the effect of the rules changes on state revenues and expenditures, including any effect on funds controlled by the agency, or a statement that the rules have no fiscal effect.

**Assessment**

The proposed changes will require no additional staff time to implement and enforce.

**II. Regulatory Analysis**

**Background**

N.D.C.C. § 28-32-08.2 requires that the North Dakota Department of Health (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 Legislative Assembly 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 for that section, and is being prepared to comply with the requirements for changes to the North Dakota Administrative Code (D.D.A.C.) Chapter 33-16-02.1, Standards of Quality for Water of the State. The Department was not required to issue a regulatory analysis under N.D.C.C. §28-32-08 but decided to do so anyway.

**Classes of People Probably Affected**

The proposed amendments to the Standards of Quality for Waters of the State have the minimal potential to affect new industries, existing industries, municipalities that plan to significantly increase discharges, or groups involved in lake improvement or maintenance projects.

New and existing industries or municipalities that plan to significantly increase discharges might be affected with the new aquatic life standards for the pesticide carbaryl and acrolein. The potential is considered minimal as neither of the two chemicals compounds were found in the North Dakota Department of Agriculture's pesticide monitoring in 2008, 2009, and 2010.

Groups or communities involved in lake improvement or maintenance would be positively affected by changing the suggested guidelines for these type of projects from

nutrient based limits of NO<sub>3</sub> as N of 0.25 mg/L and PO<sub>4</sub> as P of 0.02 mg/L to a trophic response based guideline of 20 µg/L of Chlorophyll-a.

The adding of Harmon Lake (Morton County), South Buffalo Gap (Golden Valley County) and the reclassification of Round Lake Kidder County in Appendix II is not expected to have any effect as all three meet the classification assigned, and the changes do not affect how they are currently being managed or use.

All other changes are editorial corrections or clarifications.

### **Probable Impact Including Economic Impact**

The changes proposed will have minimal or no effect on point source discharges and other regulated entities.

### **Probable Costs to the Department**

Additional staff time required to implement and enforce the changes to the rules will be minimal.

### **Alternative Methods Considered**

The Department could choose to not adopt the changes. If this occurred, the U.S. Environmental Protection Agency could establish water quality standards for North Dakota and enforce them.

## **III. Takings Assessment**

### **Background**

N.D.C.C. §28-32-09 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:

- 1) Analyze the likelihood that the proposed rule may result in a taking of regulatory taking.
- 2) Clearly and specifically identify the purpose of the proposed rule.
- 3) Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available to achieve the agencies goals while reducing the impact on private property owners.
- 4) Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
- 5) Identify the source of payment within the agency's budget for any ordered compensation.
- 6) Certify that the benefits of the proposed rule exceed the estimated compensation costs.

## **Assessment**

- 1) The proposed rules update the Standards for Quality for Waters of the State to be consistent with the Federal Clean Water Act and the federal rules promulgated thereunder. The proposed rules will not limit the use of a landowner's private real property and will therefore not result in a regulatory taking.
- 2) The purpose of the proposed rules is to update the state water quality standards
- 3) No alternative is available. The Department is required to update the state's water quality standards every three years under the federal Clean Water Act.
- 4) There will be no additional costs since the comparable federal rules are already in place.
- 5) There will be no additional costs since the comparable federal rules are already in place.
- 6) Since there will be no cost associated with the rules, any benefits achieved will exceed the costs.

## **IV. Small Entity Regulatory Analysis**

- 1) There are no small entities to the proposed rule.

## **V. Small Entity Economic Impact Statement**

- 1) There are no small entities impacted by the proposed rule.



Wayne Stenehjem  
ATTORNEY GENERAL

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DIV. OF WATER QUALITY

OPINION

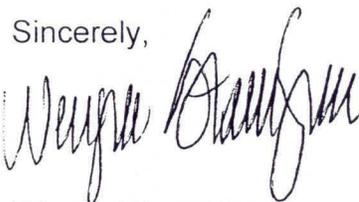
January 10, 2014

Mr. Peter Wax  
Environmental Scientist  
Division of Water Quality  
Environmental Health Section  
Department of Health  
918 E Divide Ave  
Bismarck, ND 58501-1947

Dear Mr. Wax:

The Office of Attorney General has examined the proposed amendments to N.D.A.C. ch. 33-16-02.1 concerning quality standards for state waters, 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 not prepared because there are no small entities affected by the proposed rulemaking; and 5) the proposed rules are within the agency's statutory authority.

These administrative rules are in compliance 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,  
  
Wayne Stenehjem  
Attorney General

eee/vkk  
cc: John Walstad, Legislative Council



Wayne Stenehjem  
ATTORNEY GENERAL

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**OPINION**

March 7, 2014

Mr. Peter Wax  
Environmental Scientist  
Division of Water Quality  
Environmental Health Section  
Department of Health  
918 E Divide Ave  
Bismarck, ND 58501-1947

Dear Mr. Wax:

On January 10, 2014, I approved proposed amendments to N.D.A.C. ch. 33-16-02.1, concerning water quality standards for state waters, as being in compliance with N.D.C.C. ch. 28-32. On February 14, 2014, you wrote that it was subsequently brought to your attention that certain chemical registry numbers in the rules were not current and that there was a foot note numbering error in table 1. You made these corrections to the proposed rules and asked me to review these changes pursuant to N.D.C.C. § 28-32-14.

One purpose of the public hearing and comment period relating to proposed administrative rules is to allow an agency to make changes to proposed rules based on the public comments. This office has interpreted the Administrative Agencies Practice Act to allow an agency to amend proposed rules if the general substance of the rules is not changed in a way that would be misleading to the public. These proposed changes do not make this rulemaking misleading to the public.

In this instance, the comments that prompted these changes came in after the comment period had closed, but before the proposed rules have been reviewed by the Administrative Rules Committee and before the proposed rules have become legally effective. These changes would have been approved as being in compliance with N.D.C.C. ch. 28-32 had these comments to the proposed administrative rules been received during the regular comment period. Under these circumstances, it is my opinion that the statutory minimum comment period does not prevent an agency from considering comments that are received after the comment period has closed.

Mr. Peter Wax  
March 7, 2014  
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It is my opinion that the changes proposed in your February 14, 2014, letter are in compliance with N.D.C.C. ch. 28-32 and are hereby approved as to their legality. These proposed amendments were reviewed by the State Water Pollution Control Board and were approved by the State Health Council subject to my further opinion. Therefore, these rules, including the changes noted in your February 14, 2014, letter, may be filed with the Legislative Council.

Sincerely,

A handwritten signature in black ink, appearing to read "Trenbeath", written in a cursive style.

Thomas L. Trenbeath  
Chief Deputy Attorney General

vkk  
cc: John Walstad, Legislative Council