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**NORTH DAKOTA
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**Testimony of Eric Delzer, Fertilizer Specialist
North Dakota Department of Agriculture
Administrative Rules Committee
Roughrider Room
September 15, 2014**

Chairman Devlin and members of the Administrative Rules Committee, I am Eric Delzer, Fertilizer Specialist with the North Dakota Department of Agriculture.

I am here today to discuss the proposed changes in Title 7 (Agriculture Commissioner) of the Administrative Code as they pertain to fertilizer rules. The Legislative Council provided a list of questions in an email to the Department on August 27, 2014. Answers to those questions are provided with this testimony along with other supporting documents.

The Agriculture Commissioner is given authority under North Dakota Century Code (N.D.C.C.) Chapter 19-20.1 to regulate fertilizers. N.D.C.C. 19-20.1-12 provides authority for the Commissioner to adopt rules to implement and enforce the Chapter. The Commissioner has never published fertilizer administrative rules, so these are new.

The Department is proposing to create a new article to the North Dakota Administrative Code (Article 7-15). The proposed new rules can be found in pages 3 to 7 of your supplement.

Chapter 7-15-01, found on pages 3 to 5 of the supplement, establishes investigational allowances to define how much a fertilizer's chemical composition can vary from label claims for that product to be deemed deficient. It is proposed to protect fertilizer customers to help ensure that they receive the nutrients that they have purchased. The proposed rule is based on national standards developed by the Association of American Plant Food Control Officials (AAPFCO).

Chapter 7-15-02, found on pages 6 and 7 of the supplement, establishes minimal concentrations for micronutrient claims on fertilizer product labeling. For example, it would prohibit a manufacturer from claiming that a fertilizer contained a micronutrient, such as boron or iron, unless that product contained a minimum amount of that micronutrient. It is intended to protect consumers who purchase micronutrient fertilizer products. As with Chapter 7-15-01, the proposed rule is based on national standards developed by AAPFCO.

Please note that we had also proposed creating Chapter 7-15-03, which would have established standards for containment of liquid fertilizer products in certain situations. After consideration

of the comments, we have decided to not pursue creation of Chapter 7-15-03.

Chairman Devlin and members of the committee, I thank you for this opportunity to discuss proposed administrative rule changes by the Department. Again, I have provided written answers to the specific questions posed in Legislative Council's email to us on August 27. I would be happy to answer any questions you may have.

Questions Posed by Legislative Council in their Email Dated August 27, 2014

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

No, the proposed rules are not a result of any statutory changes.

2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.

No, the proposed rules are 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.

The public notice on the proposed rulemaking was sent to the North Dakota Newspaper Association on December 5, 2013. The proposed rules were also sent to all licensed fertilizer distributors in the state on December 6, 2013, along with directions on how people could offer comments. The proposed rules were also posted on the ND Department of Agriculture website the first week of December 2013, along with information on the public hearing and how to offer comments. The public hearing on the rules was held on February 3, 2014. The comment period was held open until February 13, 2014.

4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.

The Department received 26 comments on the proposed rules. A copy of our written record of consideration of all comments we received was submitted to the Attorney General. A copy of that review is included with our testimony. Most of the comments were related to the proposed Chapter 7-15-03, which would have established standards for liquid fertilizer containment. Some commenters expressed concern that the proposed requirements were overly burdensome and unnecessary. Others expressed concern that there was no effective mechanism to differentiate between small dealers and large distributors. As a result of these comments, the Department decided to not adopt Chapter 7-15-03.

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.

The North Dakota Newspaper Association charged the Department \$2,084.40 to publish the rulemaking notice in each official county newspaper. We also expended approximately 120 staff hours researching rules from other states, drafting the

rules, doing public outreach, reviewing comments, and other tasks. This equates to approximately \$5,096 in salaries and benefits.

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

The proposed rules are needed to implement the state fertilizer law found in N.D.C.C.19-20.1. Chapter 7-15-01 establishes investigational allowances to define how much a fertilizer's chemical composition can vary from label claims for that product to be deemed deficient. Chapter 7-15-02 establishes minimal concentrations for micronutrient claims on fertilizer product labeling. Both proposed rules are based on national standards developed by the Association of American Plant Food Control Officials (AAPFCO).

7. Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.

A regulatory analysis was required, and it was submitted to the Attorney General. A copy is provided with this testimony.

8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.

The Department prepared a small entity regulatory analysis and impact statement. These were provided to the Attorney General. Copies are provided with this testimony.

9. Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.

The proposed rules will not affect state revenues or expenditures. Enclosed is a signed statement to that regard which was included with the notices to the Attorney General and Legislative Council.

10. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.

A takings assessment was not prepared.

11. If these rules were adopted as emergency (interim final) rules under NDCC Section 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. If these rules were adopted as emergency (interim final) rules, what steps were taken to make the rules known to persons who can reasonably be expected to have a substantial interest in the rules?

These rules are not adopted as emergency rules.

**Review of Public Comments on Proposed Fertilizer
Administrative Rules
March 31, 2014**

Comment Summary

| Comment Type | Number |
|------------------------|--------|
| Comments in Support | 6 |
| Comments in Opposition | 15* |
| Neutral Comments | 5 |
| <hr/> | |
| Total Comments: | 26 |

*7 of these are copies of the same email language, and two commenters (Chris Brossart and Marty Visto) each commented twice.

Consideration of Specific Comments

Comment 1

Commenter: Donald Thomas, CF Industries

Date: December 16, 2013

Specific Comment(s):

Comment: Recommended adding the following language to proposed NDAC 7-15-01: “Note: For those investigational allowances to be applicable, the recommended AOAC International procedures for obtaining samples, [or alternatively the State of ND official sampling procedures] preparation and analysis must be used.”

Recommendation/Response: The NDDA already follows standard procedures for obtaining fertilizer samples for analysis. We support adding the suggested language if it gives the regulated community more confidence in our sampling procedures.

Comment 2

Commenter: Chris Brossart, ND Farm Bureau

Date: December 15, 2013

Specific Comment(s):

Comment: Proposed rule would place burden on production agriculture and on fertilizer distributors/retailers.

Recommendation/Response: We agree that there will be a burden for those facilities that need to install secondary containment. The proposed rules would not require secondary containment on farms. Feedback from the fertilizer industry suggests that most distributors already have containment that would meet the proposed requirements. For those that do need to install containment, the rules provide several options to do so and allow ample time to come into compliance. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “Most everyone in business today does and will continue to look after the way they handle these products in an efficient and safe manner. I do not believe we need someone to regulate the issue of containment in the state of North Dakota. I would suggest that if we need to have some sort of rule that it would contain educational aspects such as what kinds of tanks to use, what kinds of valves, what to build a containment area out of, and to what specifications, etc.”

Recommendation/Response: NDDA did not propose administrative rules lightly. The fertilizer industry has pushed the need for containment requirements to give them predictability and a level playing field. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Requirements would create a monopoly and force most small businesses out of the market.

Recommendation/Response: So noted. The free market will decide which companies offer fertilizer products for sale, and feedback suggests that most facilities would already be in compliance with the proposed requirements.

Comment: Opposed to the proposed rules and believes that they are uncalled for.

Recommendation/Response: So noted.

Comment 3

Commenter: Dr. Dave Franzen, NDSU

Date: December 30, 2013

Specific Comment(s):

Comment: Recommends changing NDAC 7-15-02-01 to: “Guarantees shall be made on the elemental basis; however, the source of the micronutrient must be specified. For example, a micronutrient that is a mixture of EDTA and citric acid bound micronutrient must specify the percentage of total micronutrient in each form. An iron EDDHA micronutrient must specify the percentage of total iron in ortho-ortho-EDDHA and ortho-para-EDDHA”

Recommendation/Response: NDDA supports adding the proposed language.

Comment: Recommends a change to the definition of “Low pressure nitrogen solutions” in NDAC 7-15-03 so that it reads, “Low pressure nitrogen solutions means an aqueous solution containing dissolved ammonia.”

Recommendation/Response: The proposed definition is from the AAPFCO Official Publication. NDDA will leave the definition as it is proposed.

Comment: Recommends adding a definition to NDAC 7-15-03 for “Non-pressure nitrogen solutions” to read, “Non-pressure nitrogen solutions means an aqueous solution of ammonium nitrate and/or urea and other nitrogen fertilizers excluding anhydrous ammonia.”

Recommendation/Response: This comment proposes to break up the definition of “low pressure nitrogen solutions” into two different definitions. As stated above, the proposed definition for “low pressure nitrogen solutions” is from the AAPFCO Official Publication. NDDA has considered the comment but declines to make the requested change.

Comment 4

Commenter: Nathan Green; Glasston, ND

Date: January 17, 2014

Specific Comment(s):

Comment: Commenter thinks that proposed rules are a waste of time and taxpayer money. He also thinks that the rules will “bump the price” of fertilizers and are regulations that are not needed. Commenter also states that the rules will force smaller

businesses out of business and create logistical issues for farmers. Commenter also questions “how many more government bureaucrats” will be needed to enforce the rules.

Recommendation/Response: NDDA does not want to do anything that would raise fertilizer prices. There are high levels of price competition in the fertilizer industry. Feedback from the fertilizer industry suggests that most liquid fertilizer distributors already comply with the requirements in 7-15-01 and 7-15-02. Therefore, the proposed rules should not put a large number of dealers out of business. Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03. Last, the NDDA is not proposing adding any additional staff to enforce the proposed rules.

Comment 5

Commenter: Luke Anderson; Forman, ND

Date: January 17, 2014

Specific Comment(s):

Comment: Commenter is not convinced that the proposed rules are worth the expense. Commenter also commented that only 100,000 gallons of liquid fertilizer have been spilled in ND over the past decade out of the billions of gallons utilized every year.

Recommendation/Response: NDDA respectfully disagrees. Current estimates suggest that there 15 to 30 million gallons of liquid fertilizer used in ND each year, not “billions”. Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 6

Commenter: Pat Faul; McClusky, ND

Date: January 18, 2014

Specific Comment(s):

Comment: Commenter’s email letter was identical to Comment 4. Main points were that the rules will “bump the price” of fertilizers and are regulations that are not needed. Commenter also states that the rules will force smaller businesses out of business and create logistical issues for farmers. Commenter also questions “how many more government bureaucrats” will be needed to enforce the rules.

Recommendation/Response: See response to Comment 4.

Comment 7

Commenter: Janice Sauer; Emerado, ND

Date: January 19, 2014

Specific Comment(s):

Comment: Commenter's email letter was identical to Comment 4. Main points were that the rules will "bump the price" of fertilizers and are regulations that are not needed. Commenter also states that the rules will force smaller businesses out of business and create logistical issues for farmers. Commenter also questions "how many more government bureaucrats" will be needed to enforce the rules.

Recommendation/Response: See response to Comment 4

Comment 8

Commenter: Kathy Marquette; Rutland, ND

Date: January 20, 2014

Specific Comment(s):

Comment: Commenter's email contained many of the same themes and verbage as those in Comments 4, 5, 6, and 7. Commenter stated that that only 100,000 gallons of liquid fertilizer have been spilled over the last ten years relative to the billions of gallons utilized every year. Commenter also questioned how many positions the department would add to enforce the rules. Commenter suggested a voluntary, educational approach instead of a regulatory one.

Recommendation/Response: See response to Comments 2, 4, and 5.

Comment 9

Commenter: John Reinhardt; Glen Ullin, ND

Date: January 21, 2014

Specific Comment(s):

Comment: Commenter's email was relatively short and read as follows: "Our state Department of Agriculture has really let us down. The government regulators are driving this initiative for their own job security and the stakeholder groups have been ignored. It's an insult to all of the groups who were asked for input, because their input was brushed aside so the government employees could write their own rules for their own benefit."

Recommendation/Response: NDDA participated in an industry workgroup throughout 2012 that discussed the proposed rules at length. The workgroup contained members of the fertilizer industry, NDSU, ND Farm Bureau, and ND Farmers Union. That input was used to draft the proposed rules.

Comment 10

Commenter: Chad Weckerly; Hurdsfield, ND

Date: January 21, 2014

Specific Comment(s):

Comment: Commenter's email contained many of the same themes and verbage as those in Comment 4. Main points were that the rules will "bump the price" of fertilizers and are regulations that are not needed. Commenter also states that the rules will force smaller businesses out of business and create logistical issues for farmers. Commenter also questions "how many more government bureaucrats" will be needed to enforce the rules.

Recommendation/Response: See response to Comment 4.

Comment 11

Commenter: Donna Grotte; Finley, ND

Date: January 21, 2014

Specific Comment(s):

Comment: Commenter's email contained many of the same themes and verbage as those in Comment 4. Commenter's main points were that the rules were not worth the expense. Commenter stated that that only 100,000 gallons of liquid fertilizer have been spilled over the last ten years relative to the billions of gallons utilized every year.

Recommendation/Response: See response to Comment 4.

Comment 12

Commenter: Marty Visto; Oakes, ND

Date: January 22, 2014

Specific Comment(s):

Comment: Commenter's email contained many of the same themes and verbage as those in Comment 4 and Comment 8. Commenter stated that that only 100,000 gallons of liquid fertilizer have been spilled over the last ten years relative to the billions of gallons

utilized every year. Commenter also questioned how many positions the department would add to enforce the rules. Commenter suggested a voluntary, educational approach instead of a regulatory one. Commenter also suggested that we grandfather in existing containment systems if the rules are enacted.

Recommendation/Response: See response to Comments 2, 4 and 8. The proposed rules for primary and secondary containment are intended to prevent spills and accidental releases. Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 13

Commenter: Judy Estenson; Warwick, ND

Date: January 25, 2014

Specific Comment(s):

Comment: Commenter raised concerns that the rules could harm the agriculture industry in the state. Commenter also stated that stakeholder input “was brushed aside “. Concern was also raised that the proposed rules would throw small businesses out of business, create a monopoly, and cause higher fertilizer prices due to less competition.

Recommendation/Response: See responses to Comments 2, 4, and 9.

Comment 14

Commenter: Doug Kuruc; CHS, Mooreton

Date: January 29, 2014

Specific Comment(s):

Comment: Commenter stated that Dakota Ag Cooperative (CHS) is a proponent of diking/containment for liquid fertilizer because it “is the right thing to do”. Commenter also stated that containment is an “insurance policy” and that the cost of containment is offset by the cost for lost product and cleanup if containment was not present. Commenter also suggested that the containment rules be revised to allow use of bladder liners for bulk steel tanks.

Recommendation/Response: Comments have been noted. Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 15

Commenter: Doug Kuruc; Mooreton, ND (Comment as a concerned citizen and taxpayer)

Date: January 29, 2014

Specific Comment(s):

Comment: Commenter offered support for the proposed rules and stated that “liquid fertilizer containment is the right thing to do”. Commenter stated that there is a higher chance of a liquid fertilizer spill with more liquid product coming into the marketplace. Commenter also raised concerns with negative impact to the image of the fertilizer industry if a spill gets into a waterway. Commenter stated that the long-term cost of installing containment is small “when you look at the big picture”.

Recommendation/Response: No response needed. Input was considered.

Comment 16

Commenter: Matthew Beneda; Grafton, ND

Date: February 4, 2014

Specific Comment(s):

Comment: Commenter’s email contained many of the same themes and verbage as those in Comment 4. Commenter stated that that only 100,000 gallons of liquid fertilizer have been spilled over the last ten years relative to the billions of gallons utilized every year. Commenter stated that the proposed rules were not worth the expense.

Recommendation/Response: See response to Comments 4 and 8.

Comment 17

Commenter: Terry Weckerly; Weckerly Farms and Hurdsfield Grain Inc

Date: February

Specific Comment(s):

Comment: “pg 6, #4, containment for anything over 55 gal. I think we should be looking at 1000 gal at least, or something to get us away from regulating or worrying about shuttles.”

Recommendation/Response: The 55-gallon language is included in the definition since that is the proposed threshold of undivided quantity when a container must

meet the primary containment requirements. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 7, #11c, 250 gallons, I’m confused. The 55 gal thing comes up again and #12 states 2500 gal or more is a storage facility.”

Recommendation/Response: The definition of “storage container” describes what containers must meet the primary containment requirements. The definition of “storage facility” describes which facilities must meet the secondary containment requirements. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg7, #1, should have 4 yrs to get compliant..”

Recommendation/Response: NDDA agrees that the timeline to come into compliance with the primary containment requirements may be too short. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 8, item F, to complicated, just say the valve needs to be on the tank.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 8, #3, External sight gauges are the norm in storage cont., you should state a spring loaded shut off valve instead of automatic shut off. A spring loaded valve means you have to hold it open for liquid to flow. I had to make several calls to get to the bottom of this. There is no automatic shut off valve that would work.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 10, item 7, a real delemma getting farmers to lock things is their yards.”

Recommendation/Response: The proposed requirements state, “Valves on storage containers must be equipped with a locking withdrawal valve or must be stored in a secure area.” Locks would only be required if the storage containers were unattended or outside of a secure area. NDDA considers a farmyard to be an attended and secure area, meaning that locks would not be required in most cases. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “Dealers and Distributors should be in different categories. A dealer does not handle near the amount of product a Distributor does. The Operational containment part of this is over the top. A small dealer will only handle 20 trucks a year as where a Distributor can do 50 trucks per day. This is hard for small dealers to justify.”

Recommendation/Response: The corresponding law (N.D.C.C. 19-20.1) covers “distributors” and does not define the term “dealer”. A “distributor” in the law is defined as “any person who imports, consigns, manufactures, produces, compounds, mixes, or blends fertilizer, fertilizer materials, micronutrients, specialty fertilizers, soil amendments, or plant amendments, or who sells or offers for sale fertilizer, fertilizer materials, micronutrients, specialty fertilizers, soil amendments, or plant amendments in this state.” A “distributor” in the proposed rules would cover small dealers as well as major distributors. There would be no way to differentiate between small dealers and major distributors without creating new definitions, either in the law or in the administrative rules. Because of this, and because of potential negative impacts to small fertilizer dealers, the NDDA will not proceed with establishing liquid fertilizer containment requirements in the proposed NDAC 7-15-03.

Comment: “pg 10 we should have 4 years to implement”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 10 #2, diking. There is no reason to have a sloped floor. We are talking about containment. A sloped floor can add further to the cost. I have sloped floors in other building and unless the slope is fairly steep, people can't seem to get it right. One of the bigger points is now the floor is sloped, how do I get my tank to stand straight up. However, it should have sumps to push the product to as to have a sump pump to get the

product out.”, and “I currently have a fuel dike and that is how we have that set up and it works fine. We can contain the spill and then worry about getting it out of the dike. With a level floor and a sump in 2 corners it works well. I know this from getting rain water out.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg10, item 2 a 2. We should not need 125%. 110% should be fine, why add to an already burdensome project. To get a rain during a spill would be what, 10,000 to 1 odds. Its not to hard to just say a dike should be emptied after a rain event.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 11 item 4. Footings to avg frost depth, who will determine this? Ever hear of a monolithic cement pour? You want to pour the walls and the floors at the same time and tie them together. This helps prevent gaps in the main seams. Also, different soils require different planning as to peers and how to make the base under the soil. A 4 to 5 ft layer of gravel under the cement generally stops the heaving because it doesn't hold water as clay does.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 14, pads. Again, lets get back to Distributors and Dealers. Lets use some common sense here. A avg size or smaller dealer will not handle near the volume a Distributor does. 20 loads a year vs. 20 loads or more per day. To set up these pads as you have proposed will cost half as much or more than the dike.”, and “I suggest you set up a different criteria for smaller dealers, base it off some kind of gallonage put thru.”

Recommendation/Response: The language relating to operational areas and operational containment is taken directly from the AAPFCO uniform rules. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “pg 15, this should be up to 1000 gal min. Honestly, who is going to tell you of a spill of 100 gal.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 18

Commenter: North Dakota Department of Health

Date: February 5, 2014

Specific Comment(s):

Comment: “7-15-02-02 – Warning Statements

This section regards the need for warning statements for any product which contains a micronutrient in water soluble form. Crop damage and/or “unusual environmental conditions” require a warning statement. However, nothing is said about the possible threat to human health of either the handler or area residents using groundwater as drinking water sources. We recommend that language be added to include human health warnings.”

Recommendation/Response: NDDA agrees with the proposed change.

Comment: “7-15-03-03 – Secondary Containment

In current form, the draft rule specified secondary containment required only at distribution facilities. The Department feels that secondary containment of fixed storage locations with undivided quantities of 2,500 gallons or more should have secondary containment, regardless of the location or ownership.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “7-15-03-03 #2A (1 and2) – Diking

In both 1 and 2, only rainfall is referred to. To avoid problems in the future, the code should say “precipitation”. That would then include snow pack and ice.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “7-15-03-03 #2A (3) Liners

The opening paragraph is confusing. The requirements could be interpreted as applying only to the base and interior of the earthen walls, not the entire containment.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “7-15-03-06 – Accidental Release Reporting

Should this section be renamed to include any release of liquid fertilizer outside of containment, which exceeds 100 gallons?”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “In the event of a spill of fertilizer that is likely to cause pollution of waters of the state (including groundwater), that fertilizer would be considered a waste. NDCC 61-28 and NDAC 33-16-02.1-11(4) requires reporting to the Department of Health. Does this indicate that the Agriculture Commissioner is going to accept the responsibility of then notifying the Department of Health within the reporting period?”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “The reportable quantity in the event of a spill is quite large. A 100 gallon release of 28% nitrogen could result in a rise of nitrogen concentration to twice the allowable maximum contamination level in drinking water (10mg/L) in 1.4 million gallons of water. So, a much lower reportable quantity may be desirable.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 19

Commenter: Marty Visto; Oakes, ND

Date: February 6, 2013

Specific Comment(s):

Comment: Commenter raised concerns that the rules could negatively affect small specialty fertilizer businesses that are operated by farmers. He presented an example that a large farm with 100,000 gallons of liquid fertilizer would be exempted from the need for secondary containment, while a small farmer dealer with 20,000 would need to have containment.

Recommendation/Response: Please see the response to Comment 17. The proposed rules for secondary containment would only apply to fertilizer distributors, and this would cover a farmer who also sold fertilizer. The proposed rules for containment would not differentiate between small dealers and large distributors, and there would be no way to differentiate between small dealers and major distributors without creating new definitions, either in the law or in the administrative rules. Because of this, and because of potential negative impacts on small fertilizer dealers, the NDDA will not proceed with establishing liquid fertilizer containment requirements in the proposed NDAC 7-15-03.

Comment: Commenter raised concerns with the requirement to come into compliance within 2 years. Commenter stated that some facilities could be potentially be required to rebuild their containment system if it does not comply with the proposed rules.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Commenter stated that fertilizer spills are rare. Commenter also discussed the low chance that a spill could breach current containment as follows: "I understand that fertilizer spills do occur, but this in itself is very rare. Now calculate the odds that an existing containment system would have a breach under the proposed ruling. First, you need to have a spill. Second, it will have to be the biggest tank that leaks. Third, that largest tank has to be completely full. And fourth, the containment would have to be 25% full of rainwater. The resulting chance of a spill under the proposed ruling is so astronomically impossible that I have to wonder why we are looking to penalize the businesses that have taken it upon themselves, with their own initiative, to build common sense containment. And even if the spill would breach the top of the containment, the resulting percentage of the problem is miniscule in comparison. There is common sense and then there is over regulation by government agencies."

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Commenter offered the following three suggestions:

“1: To not require any secondary containment within the state of North Dakota, but to encourage, educate, and provide guidelines and technical knowledge to the liquid fertilizer industry to take it upon themselves to determine the extent of containment that is required for their individual needs. We would be better served to provide voluntary initiatives to these businesses instead of the over-regulation of the proposed rules.”, and

“2: If not #1, then to exempt the small liquid fertilizer retailers with less than 100,000 gallons of storage in well maintained tanks with a maximum tank size of 35,000 gallon or less.”, and

“3: And, grandfather all existing containment systems as compliant as long as they are well maintained and contain 100% of the largest tank.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 20

Commenter: Ed Rieker; W Design Associates, North Platte, NE

Date: February 6, 2014

Specific Comment(s):

Comment: Pg 6: “Given the definition of #6 shouldn't "Low Pressure Nitrogen Solutions" be excluded from this definition?”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 7: Recommended adding , “and are generally accepted and used in the fertilizer industry” to 7-15-03-2(1)(b)

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 8: Recommended changing 7-15-03-2(1)(c) to read, “Materials used in the construction or repair of storage containers and appurtenances shall be suitable for and generally accepted in the fertilizer industry.” (Your language effectively eliminates the use of mild steel for storage containers as steel is "electrolytically and chemically reactive" when exposed to most liquid fertilizers. It is weakened over time due to the corrosion of the steel however it is a widely used, economical and acceptable means of storage of most liquid fertilizers. I suggest that you have a provision for industry approved testing of "large" storage containers, i.e. 100,000 gallons + on a regular basis {TFI recommends every 5-10 years} and that the results of the testing be maintained on either the site or at the company headquarters. An API 653 is a good standard to apply.)

Recommendation/Response: The proposed language is out of the AAPFCO model rules and is incorporated in to the regulations in several states. However, due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 9: Recommended adding “or utilize an internal lining system” to 7-15-03-02(5)(c)

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 9: 7-15-03-02(5)(f): This language effectively eliminates the use of mild steel storage tanks for storing starter grade fertilizers. Mild steel has been used successfully for 50 years in this application. This language will force the replacement of many mild steel storage tanks in ND at great cost. This should be eliminated.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19),

the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 10: 7-15-03-02(7): This language prevents the use of a chain and a padlock. Is this what you want? This language will force many in the industry to re-valve tanks already in service.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 10: 7-15-03-03(1): Recommended adding, "...or as allowed for in the "Innovative Design" chapter in this legislation"

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Recommends changing "storage containers" throughout the chapter with "primary containment storage containers"

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 10, Diking: "I suggest the language be "Storage containers must be contained including a sump utilizing a containment system capable of achieving the following requirements except as may be allowed for in the "Innovative Design" chapter in this legislation:"

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 11: 7-15-03-03(2)(b)(4): Commented that he could not find floating concrete base stated anywhere in the chapter.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 11: 7-15-03-03(2)(c)(2): “Do you have a specific permeability standard these liners must meet? You have one spelled out for the "clay liner" however as I read this it doesn't include synthetic liners.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 11: 7-15-03-03(2)(c)(2): “Is there a means to test a sodium bentonite encapsulated liner?”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 12: 7-15-03-03(2)(c)(4): Recommended adding, “or as allowed for in the "Innovative Design" chapter in this legislation”.

Recommendation/Response: See response above

Comment: Pg 12: 7-15-03-03(2)(c)(4): Recommended adding, “...or stamped drawings from a North Dakota licensed professional engineer” to the subsection.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 13: Recommends adding subsection “e” to the “Liners” subsection to allow for “innovative designs”

Recommendation/Response: Please see response above.

Comment: Pg 13: 7-15-03-03(3)(c): “remove "clay" as this is certain to hasten under-floor corrosion as the water will not be able to dissipate away from the floor steel.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 13: 7-15-03-03(3)(c): Recommends adding, “or a base designed and stamped by a North Dakota registered professional engineer.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 14: Recommended several editorial changes to the “Doubled walled storage containers” subsection.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 15: 7-15-03-04(4): “Does the "above ground container" have to be in containment?”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 15: 7-15-03-05: Recommended adding a new subsection (4) to read, “Liquid bulk fertilizer containers with capacities exceeding 100,000 gallons shall be professionally inspected utilizing an industry standard inspection protocol at least every 5 years and the records of the inspection shall be kept for at least 10 years and made available to the "Department" upon request.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19),

the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Pg 16: Recommended adding an “Innovative Designs” section.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 21

Commenter: Mark Watne, North Dakota Farmers Union

Date: February 12, 2014

Specific Comment(s):

Comment: Commenter stated that proposed rules for investigational allowances and micronutrient guaranteed analysis are important to safeguard farmers. Commenter recommended implementation of those rules before the coming spring fertilizer season.

Recommendation/Response: NDDA intends to move ahead with rule-making as quickly as possible, while allowing adequate time for deliberation.

Comment: Commenter discussed that water quality has been elevated as a national priority and that the rules “are a common sense approach in preventing accidental discharge of fertilizer”.

Recommendation/Response: No response necessary. Comment is noted.

Comment: Commenter stated that he appreciates that farmers will be exempt from the secondary containment requirements and that the secondary containment requirements only apply to fertilizer distributors holding fertilizer for more than 30 days.

Recommendation/Response: No response necessary. Comment is noted.

Comment: Commenter requested that the rules be amended to give distributors three years to comply with the secondary containment requirements.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19),

the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “We request the final regulations are accompanied with frequently asked questions, simple fact sheets, and public meetings to educate farmers and the industry. We would welcome the opportunity to work with the department in organizing such informational meetings. Providing the agriculture commissioner works to utilize educational compliance and allows flexibility to accommodate differing situations, we support these new rules.”

Recommendation/Response: NDDA notes the need to accompany any new administrative rules with appropriate outreach and compliance assistance.

Comment 22

Commenter: Bob Wisness, North Dakota Grain Growers Association

Date: February 12, 2014

Specific Comment(s):

Comment: “On page 6 item number 4 NDGGA would request the Department increase the definition of “liquid bulk fertilizer” to 1000 U.S. gallons.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “On page 7 under the General Requirements Section number 1 NDGGA would request that compliance begin 4 years from the date of approval.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “On page 8 under item number 3 we would request that a spring-loaded shut off valve be required.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “On page 10 under item number 7 (Locks) NDGGA feels this rule is impractical and should be eliminated.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “NDGGA recommends the North Dakota Department of Agriculture define “dealers” and “distributors” for purposes of this section and differentiate between regulations that would impact dealers and regulations that would impact distributors.”

Recommendation/Response: The corresponding law (N.D.C.C. 19-20.1) covers “distributors” and does not define the term “dealer”. A “distributor” in the law is defined as “any person who imports, consigns, manufactures, produces, compounds, mixes, or blends fertilizer, fertilizer materials, micronutrients, specialty fertilizers, soil amendments, or plant amendments, or who sells or offers for sale fertilizer, fertilizer materials, micronutrients, specialty fertilizers, soil amendments, or plant amendments in this state.” Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: “...NDGGA recommends that regulatory differentiation by size of operation be instituted on both the dealer and distributor definitions. NDGGA is very concerned that applying a “broad brush” approach to liquid fertilizer regulations will disadvantage small dealers and distributors to the detriment of the customers which they serve.”

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment 23

Commenter: Eric Lahlum, North Dakota Agricultural Association

Date: February 13, 2014 (Testimony at hearing)

Specific Comment(s):

Comment: Commenter stated that following stewardship practices intended to maintain groundwater quality is important to maintain the long term availability and opportunity to use crop nutrients.

Recommendation/Response: No response necessary. Comment is noted.

Comment: Commenter suggested that the time required to come into compliance with the proposed primary containment requirements be changed from two to three years.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Commenter suggested that the volume threshold requirement for primary containment be increased to 270 gallons of undivided quantity.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Commenter suggested that a staff member from the NDDA or NDSU Extension be available to consult farmers, dealers, and others on the most effective and economical methods to establish containment.

Recommendation/Response: Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

Comment: Commenter suggested that the Agriculture Commissioner consider a low interest loan or grant program, funded by fertilizer tonnage fees, in those cases when a farm or dealership needs financial assistance to set up containment.

Recommendation/Response: This would require a law change, not an administrative rules change.

Comment 24

Commenter: Chris Brossart, North Dakota Farm Bureau

Date: February 13, 2014 (Testimony at hearing)

Specific Comment(s):

Comment: Commenter stated that he opposed the proposed fertilizer containment rules and that the rules would place a burden on production agriculture and the fertilizer

industry. The points offered in the testimony are the same as those offered in his written comments (Comment 2 above).

Recommendation/Response: See response to Comment 2

Comment 25

Commenter: Darrell Scheresky; Enerbase Agronomy, Washburn, ND

Date: February 13, 2014 (Testimony at hearing)

Specific Comment(s):

Comment: Commenter testified that proposed rules in Chapter 7-15-01 and 7-15-02 are “easy to stomach”

Recommendation/Response: NDDA concurs. No response needed.

Comment: Commenter stated the need to be good stewards of the land, and stated that he was in support of the proposed rules. Commenter further discussed concerns with leaks and the importance of states proposing containment. He stressed the need for strategies to be put in place to ensure that a leak or spill does not happen. He also stressed the need for North Dakota to police itself.

Recommendation/Response: No response needed.

Comment 26

Commenter: Paul Mathiason, Red River Sugarbeet Growers

Date: February 13, 2014 (Testimony at hearing)

Specific Comment(s):

Comment: Commenter questioned the need for the rules and whether there is a problem that needs to be addressed. He stated that the result of the rules will be “fewer and fewer distributors” and that “we will be putting people out of fertilizer business simply because they do not have enough volume to comply with the regulations”.

Recommendation/Response: The comments have been noted. Feedback from the fertilizer industry suggests that most distributors already comply with the requirements found in 7-15-01 and 7-15-02. Due to concerns about the inability to differentiate requirements for small dealers and large distributors (see Comments 17 and 19), the NDDA will not proceed with establishing liquid fertilizer containment requirements as proposed in NDAC 7-15-03.

REGULATORY ANALYSIS

No written request was filed for a regulatory analysis by the governor or a member of the Legislative Assembly. However, the regulatory analysis is necessary as the proposed rule may have an impact on the regulated community in excess of \$50,000.

- A. Classes of persons likely to be affected by the proposed rule, including classes bearing the cost of the proposed rule and classes benefiting from the proposed rule:
- a. Chapter 7-15-01 would affect fertilizer manufacturers, fertilizer distributors, the North Dakota Department of Agriculture, and fertilizer users. Fertilizer users, including farmers, would benefit from the proposed rule by being assured that the fertilizer they purchased matches label claims for fertilizer composition. The North Dakota Department of Agriculture would benefit by having an established standard for fertilizer deficiencies. The fertilizer industry would benefit by having a framework for fair and consistent regulation.
 - b. Chapter 7-15-02 would affect fertilizer manufacturers, fertilizer distributors, fertilizer registrants, the North Dakota Department of Agriculture, and fertilizer users. Fertilizer users, including farmers, would benefit because micronutrient claims on fertilizer products would need to be supported by a minimum concentration of those micronutrients. The North Dakota Department of Agriculture would benefit by having an established standard for when micronutrient claims can be made. The fertilizer industry would benefit by having a framework for fair and consistent regulation.
 - c. Chapter 7-15-03 would affect fertilizer distributors, agricultural producers, the North Dakota Department of Agriculture, and the general public. The Chapter would establish standards for primary and secondary containment of liquid fertilizer products. The primary containment requirements would apply to all liquid fertilizer containers in excess of 55 gallons, while the secondary containment requirements would apply to distributors holding fertilizer in undivided quantities greater than 2,500 gallons for more than 30 days. The main benefit would be prevention of accidental liquid fertilizer spills contaminating the environment, including groundwater and surface water. The benefit to fertilizer users would be prevention of economic losses resulting from fertilizer releases. The benefit to distributors would be the capture of any spilled liquid fertilizer in secondary containment, thereby mitigating further economic losses, including costs for environmental remediation. The benefit to the fertilizer industry as a whole is predictability of design requirements as new liquid fertilizer facilities are being designed and existing facilities are retrofitted.
- B. The probable impact, including the economic impact of the proposed rule:
- a. Chapter 7-15-01 would have minimal economic impact since it mirrors existing industry standards for investigational allowances.

- b. Chapter 7-15-02 would have minimal economic impact since it mirrors existing industry standards for micronutrient minimum concentrations.
- c. Chapter 7-15-03 could have significant economic impact for entities that distribute or use liquid bulk fertilizer. Persons affected by the proposed primary containment requirements would be those with storage containers and appurtenances that do not meet the proposed minimum standards. Feedback received to date suggests that most containers and appurtenances in the marketplace would meet the proposed requirements. However, some entities may need to place berms or other barriers to prevent damage to tanks and appurtenances from trucks and other moving vehicles, but these costs would be minimal.

The proposed requirements for secondary containment would only apply to liquid fertilizer distributors. Assuming 25 percent of the 424 licensed fertilizer distributors in the state handle liquid products, approximately 106 distributors would be affected by the proposed requirements. Many fertilizer distributors already have secondary containment, but if we assume that half of the liquid fertilizer distributors will need to install or upgrade their secondary containment, approximately 53 businesses would be affected. Cost to install a diking system for most affected businesses would be \$15,000 to \$30,000, although using an elephant ring (one of the allowed means for secondary containment in the proposed rules) will be significantly more inexpensive.

- C. Estimated cost to the agency of implementation and enforcement of the proposed rule and any anticipated effect on state revenue.
 - a. Chapter 7-15-01: There is no cost to the agency for implementation of the proposed rule. State revenue from civil penalties will be minimal. The fertilizer law provides authority for the Agriculture Commissioner to issue stop-sale orders or a civil penalty up to \$2,500 when violations are identified. However, the department focuses its efforts on outreach and compliance assistance, not solely civil penalties, as a means to drive compliance. In addition, we utilize enforcement response policies that create a stepped approach to civil penalties, starting with warnings and lower civil penalties for first-time violations. Higher penalties are only reserved for repeat violations and when other compliance strategies have been shown to be ineffective. Increased state revenue from civil penalties should be less than \$2,500 per biennium.
 - b. Chapter 7-05-02: There is no cost to the agency for implementation of the proposed rule. State revenue from civil penalties will be minimal. The fertilizer law provides authority for the Agriculture Commissioner to issue stop-sale orders or a civil penalty up to \$2,500 when violations are identified. However, the department focuses its efforts on outreach and compliance assistance, not solely civil penalties, as a means to drive compliance. In addition, we utilize enforcement response policies that create a stepped approach to civil penalties, starting with warnings and lower civil penalties for first-time violations. Higher penalties are

only reserved for repeat violations and when other compliance strategies have been shown to be ineffective. Increased state revenue from civil penalties should be less than \$1,000 per biennium.

- c. Chapter 7-15-03: There will be minimal cost to the agency for implementing the proposed rule. The agency will need to create a fertilizer distributor inspection form at a cost of approximately \$200. There will be no increased costs to perform inspections since staff will do containment oversight when visiting those locations for other duties. The agency will need to develop outreach and compliance assistance tools such as brochures and handouts. There will also be costs associated with travel to conduct compliance assistance visits and public meetings. Total costs for developing, printing, and delivering compliance assistance tools will be approximately \$10,000.
- D. Description of alternative methods of achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.
- a. Chapter 7-15-01: This Chapter establishes investigational allowances to define how much a fertilizer's chemical composition can vary from label claims for that product to be deemed deficient. It is proposed to protect fertilizer customers to help ensure that they receive the nutrients that they have purchased. There is no other way to deem such products deficient without establishing regulatory standards. The proposed rule is based on national standards developed by the Association of American Plant Food Control Officials (AAPFCO).
 - b. Chapter 7-15-02: This Chapter establishes minimal concentrations for micronutrient claims on fertilizer product labeling. It is intended to protect consumers who purchase micronutrient fertilizer products. There is no other way to deem such products deficient without establishing regulatory standards. The proposed rule is based on national standards developed by AAPFCO.
 - c. No alternative methods for achieving the purpose of the proposed rules were seriously considered since the fertilizer industry in North Dakota asked for industry standards dealing with primary and secondary containment of liquid fertilizers. The proposed rules provide the industry with those standards and options for primary and secondary containment. As part of the process, the agency reviewed a model regulation from AAPFCO and researched containment requirements from other states to ensure that the proposed requirements were reasonable and consistent with industry standards.

Please note that secondary containment of liquid fertilizer is not required for farmers in the proposed rule. Instead, the agency opted to utilize a voluntary approach based on best management practices to minimize impact on agriculture.

This analysis was available on or before the date of public notice.

SMALL ENTITY REGULATORY ANALYSIS
(Discuss each question)

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?

Yes, the department did consider less stringent compliance requirements for small entities. However, we decided to establish uniform requirements based on our knowledge of the fertilizer industry and to better protect consumers. Furthermore, many of the proposed requirements are based on national standards.

The proposed requirements in N.D.A.C. 7-15-01 and 7-15-02 are intended to protect consumers, and compliance should be no more or less difficult for small entities compared to large businesses.

2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? To what result?

The department did not establish a less stringent compliance schedule for small entities compared to large businesses, although such an approach was considered. The proposed consumer protection provisions in N.D.A.C. 7-15-01 and 7-15-02 would apply to the industry as a whole, and the hope is that all businesses are already in compliance, regardless of the size of the business.

3. Was consolidation or simplification of compliance or reporting requirements for small entities considered? To what result?

No, the department did not consider simplified or streamlined requirements for small entities. The size of the business should have no bearing on the applicability of the proposed rules.

4. Were performance standards established for small entities for replacement design or operational standards required in the proposed rule? To what result?

The proposed requirements in N.D.A.C. 7-15-01 and 7-15-02 are performance standards that apply to all businesses, regardless of the business size.

5. Was exemption of small entities from all or any part of the requirements in the proposed rule considered? To what result?

No, exempting small entities from the proposed rules was not considered. The proposed requirements in N.D.A.C. 7-15-01 and 7-15-02 are consumer protection standards, and there is an expectation on the part of consumers that they will be provided with high-quality fertilizer products, regardless of the size of the business.

SMALL ENTITY ECONOMIC IMPACT STATEMENT
(Discuss each question)

1. Which small entities are subject to the proposed rule?

All fertilizer distributors would be subject to the proposed rules in N.D.A.C. 7-15-01 and 7-15-02, regardless of the size of the business.

2. What are the administrative and other costs required for compliance with the proposed rule?

There should be no administrative or other costs to comply with the proposed rules in N.D.A.C. 7-15-01 and 7-15-02.

3. What is the probable cost and benefit to private persons and consumers who are affected by the proposed rule?

There will be no cost to private citizens and consumers who are affected by the proposed rule since fertilizer prices are set according to what the market will bear. Fertilizer consumers should see a significant benefit from the proposed rules in N.D.A.C. 7-15-01 and 7-15-02 by being assured that the fertilizer they purchase matches label claims for fertilizer composition and that any micronutrient claims are supported by minimum concentrations.

4. What is the probable effect of the proposed rule on state revenues?

The proposed rules do not create any new licensing or registration requirements. The only state revenues would occur when civil penalties are collected for violations. The department focuses its efforts on outreach and compliance assistance, not solely civil penalties, as a means to drive compliance. State revenues from civil penalties should be less than \$2,500 per biennium.

5. Is there any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule?

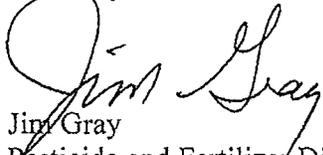
Chapters 7-15-01 and 7-15-02 simply establish industry standards for investigational allowances and micronutrient minimum concentrations, respectively. The proposed requirements mirror existing industry standards and are based on national guidelines developed by the American Association of Plant Food Control Officials. There is no other way to achieve the intended purpose without establishing the proposed rule.

FISCAL NOTE

The proposed rules in N.D.A.C. 7-15-01 and N.D.A.C. 7-15-02 establish industry standards for fertilizer investigational allowances and micronutrient minimum concentrations, respectively. They do not create any new registration or licensing requirements, so the rules should not result in any additional revenue to the agency. Enforcement of the new requirements will not require the agency to expend significant resources.

Therefore, we conclude that the proposed rules will have no fiscal impact.

Sincerely,

A handwritten signature in black ink that reads "Jim Gray". The signature is written in a cursive style with a large, looped initial "J".

Jim Gray
Pesticide and Fertilizer Division Director