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ADMINISTRATIVE RULES COMMITTEE MEETING
December 12, 2012
Roughrider Room, State Capitol

Testimony on Behalf of Agriculture Commissioner
Doug Goehring Concerning Proposed Administrative
Rule Changes to North Dakota Administrative Code
60-03 (Pesticides)

ADMINISTRATIVE RULES COMMITTEE MEETING

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With respect to the rules published in the January 2013 supplement, the committee is interested in and would like you to testify before the committee concerning the following matters:

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

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

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

Please see the Regulatory Analysis, Small Entity Economic Impact Statement, Small Entity Regulatory Analysis and the Takings Assessment. Some of the proposed rules are related to federal regulations adopted by the EPA. The proposed rules would give the North Dakota Department of Agriculture (Department) the authority to regulate and enforce the recently adopted regulations.

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.

As required, the Department sent the Abbreviated Notice to each official county newspaper at least 24 days before the Public Hearing held on August 23, 2012. In addition, the Department held 8 public meetings to inform the regulated community about the Department's plans to perform rulemaking (schedule attached) prior to beginning the process. The Abbreviated Notice was also sent to all major interest groups via email on July 24, 2012.

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 comment period yielded no written or oral concern, objection, or complaint as stated in the Department's letter to The Honorable Wayne Stenehjem.

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 cost of publication for the notice was \$1,687.10. The cost of having an attorney review documents in preparation for rulemaking was approximately \$230.

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

Please refer to the documents in the Department's written testimony titled "Proposed ND Pesticide Rules" and "Summary of Proposed Changes to North Dakota Pesticide Administrative Rules". Significant changes were made to the Pesticide Act during the 2009 Legislative Assembly. The proposed significant changes include improved readability, clarifying commercial pesticide certification classes, adding military deferment provisions, adding language and adopting federal rules to meet equivalency for federal EPA bulk container/containment regulations, expanding spill kit requirements

to public applicators rather than solely commercial applicators, exempting private pesticide applicators from posting pesticide storage areas, adding discretionary authority for pesticide certification applications and requiring additional training for recertifying aerial applicators at the request of the ND Aerial Applicators Association.

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.

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 copy is provided.

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 majority of the proposed rule changes are cosmetic in nature and are intended to make the rules easier for all to understand and are intended to improve transparency. However, the Department deemed it necessary to prepare the above mentioned documents and copies are provided.

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.

A fiscal note was not required because these rules have no fiscal effect.

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

For the taking assessment, subsection 1 of Section 28-32-09 sets forth six requirements, set forth in subdivisions "a" through "f," but we understand that the Attorney General's Office interprets Section 28-32-09 to require compliance with subsection 1 only if the proposed rules constitute a taking. It is our assessment that the likelihood that the proposed rules would result in a taking or a regulatory taking is minimal, if not non-existent. This is our assessment given the nature of the proposed rules and the definitions of "taking" and "regulatory taking" in subsection 3 of Section 28-32-09, as well as our understanding of the way in which the courts have addressed taking and regulatory taking claims under administrative regulations. In light of our assessment that the proposed rules do not implicate a taking, we don't believe that we are required to address subdivisions "b" through "f" in Subsection 1 of Section 28-32-09. Nonetheless, we have done so and a copy is provided.

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 were not adopted as emergency rules.

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 who will probably be affected by the proposed rule are North Dakota land owners, tenants, renters, lessees, the North Dakota Department of Agriculture (NDDA), and all entities that handle and use pesticides. Significant changes include: a) persons and entities must comply with the federal container and containment regulations. The container regulations are being proposed for adoption into N.D.A.C. 60-03-01. As for the containment regulations, NDDA is proposing new permanent containment rules in order to maintain equivalency with the federal regulations. b) Private applicators must become certified in the vertebrate certification class to use fumigant pesticides to control burrowing pests. c) Certified aerial applicators must attend a professional aerial applicators' support system (PAASS) or other Board-approved training program at least once every three years. Benefits from the proposed rule changes include maintaining equivalency and primacy with regard to enforcing container and containment regulations, minimizing adverse affects to humans, animals, and the environment from pesticide discharges, ensuring the safe and effective use of fumigants and ensuring aerial applicators have proper and sufficient training with regard to aerially applying pesticides.
- b. The proposed rule may have an impact in cases where violations of Pesticide Act occur, in which case violators may face civil penalties for non-compliance. Violators may be assessed an administrative penalty of up to \$5,000 for each violation and/or have their certification(s) suspended or revoked. In addition, persons who currently use fumigants to control burrowing pests will now need to pay a fee as part of the certification process for obtaining a private applicators certification in the vertebrate class. Moreover, persons and entities engaged in pesticide repackaging and distribution may need to make changes to permanent containment areas, which may involve major construction/re-construction of existing containment structures where bulk pesticides are stored or repackaged. Entities and persons will also need to comply with the adopted federal container regulations, which require repackager's to maintain the required records and follow procedures defined in the federal regulations proposed to be adopted into state rules. Finally, aerial applicators attending PAASS or other Board-approved programs will likely incur costs associated with traveling to and attending the required training program.
- c. Probable costs to the NDDA include salary dollars for investigating or inspecting a potential or known violation and will include an increase in outreach efforts to ensure compliance with the proposed rules.

No alternative methods for achieving the purpose of the proposed rules were seriously considered since current federal regulations require the container and containment regulations to be adopted or added to state rules in order for the state to enforce these regulations. Moreover, private applicators are currently required to be certified to use fumigant pesticides for stored commodities, but are not required to use fumigant pesticides to control burrowing pests. Both uses of fumigant pesticides pose

a significant risk to human health; thus, the rule would help to ensure the safe use of fumigants for all uses. Regarding the PAASS or other Board-approved program that will be required in order for aerial applicators to obtain recertification, the NDDA and Pesticide Control Board have consulted with the ND Aerial Applicators Association (NDAAA), which endorses and promotes the PAASS program and the additional training requirement proposed in these rules. This particular rule change was the result of a request for additional training requirements by the NDAAA.

The majority of the proposed rule changes are cosmetic in nature and are intended to make the rules easier for all to understand and are intended to improve transparency.

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

SMALL ENTITY REGULATORY ANALYSIS

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

No. The review and subsequent changes to the pesticide rules are intended to be consistent and fair to all affected entities to ensure the continued safe and effective use of pesticides in North Dakota. The substantive changes to the rules with regard to compliance or reporting are required by recently implemented federal pesticide container and containment regulations and will allow the NDDA to enforce those regulations/rules once adopted and added. The substantive changes to the rules with regard to the required professional aerial applicators' support system (PAASS) training or other Pesticide Control Board (Board)-approved training program for aerial pesticide applicators was additional training the ND Aerial Applicators Association (NDAAA) requested to ensure the safe and effective application of pesticides by aerial applicators.

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

Yes. With regard to the container and containment rules, the federal requirements went into effect on August 17, 2011 and all entities were required to come into compliance on that date. However, because the NDDA recognizes that the regulations may take time to come into compliance with, NDDA will allow ample time for affected entities to come into compliance before taking enforcement actions resulting from noncompliance. The timeline for required attendance at PAASS programs by aerial applicators every three years follows what is currently required of all certified applicators outlined in N.D.A.C. 60-03-01-05.1 with respect to recertification requirements.

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

No, the requirements for all entities to comply with the Pesticide Act are equal to all affected individuals. However, with regard to the additional permanent containment regulations and the adopted federal container regulations, the NDDA will allow ample time for those affected individuals to come into compliance before taking enforcement actions resulting from noncompliance. Also, the requirement for aerial applicators to attend PAASS or other Board-approved training program every three years was based on a request from the NDAAA and based on the fact that PAASS is a national training program offered to all aerial pesticide applicators throughout the country.

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

Yes, the NDDA will allow ample time for those affected individuals to come into compliance before taking enforcement actions resulting from noncompliance.

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

No, the federal regulations being added and adopted do not allow for the exemption of small entities. Moreover, all entities are subject to the Pesticide Act.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

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

All entities that handle or use pesticides, specifically those who use fumigant pesticides to control burrowing pests, those that handle pesticide containers and who repackage bulk pesticides for the purpose of distribution and those required to be certified in order to apply pesticides aerially.

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

Construction or reconstruction of existing containment structures may be required in order for entities to comply with the permanent containment regulation. Also, administrative costs for keeping the required container records and following container cleaning procedures (as defined in the federal container regulations), and paying fees required to obtain a private applicator's certification in the vertebrate class to control burrowing rodents with fumigant pesticides may also be required. Moreover, aerial applicators attending a required professional aerial applicators' support system (PAASS) program will likely incur costs associated with traveling to and attending the training program.

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

Probable costs include fees required to be paid before being issued a private applicator's certification in the vertebrate class for the purpose of controlling burrowing pests using fumigant pesticides and travel/registration costs associated with aerial applicators attending PAASS or other Board-approved training programs for aerial pesticide applicators. We do not expect any other costs to private persons and consumers. The benefit is that anyone using restricted use fumigant pesticides, which pose a significant risk to human health, will be properly trained and certified. People indirectly affected by these types of fumigant applications will be better protected. Second, aerial applicators certified to apply pesticides in ND will receive additional training and information for making safe and effective aerial pesticide applications. Third, those involved in the repackaging and distribution of bulk pesticides and those handling pesticide containers will be better protected from pesticide exposure due to accidental discharges of pesticides. Finally, assuming the federal container regulations are adopted, and assuming the new rules reflecting the federal containment regulations are included into N.D.A.C. 60-03-01, NDDA will have primacy over the enforcement of those regulations imposed by the environmental protection agency.

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

The probable effect on state revenues is predicted to be minimal.

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

No alternative methods for achieving the purpose of the proposed rules were seriously considered since current federal regulations require the container and containment regulations to be adopted or added to state rules in order for the state to enforce these regulations. Moreover, private applicators are currently required to be certified to use fumigant pesticides for stored

commodities, but are not required to use fumigant pesticides to control burrowing pests. Both uses of fumigant pesticides pose a significant risk to human health; thus, the rule would help to ensure the safe use of fumigants for all uses. Finally, the proposed rule regarding required attendance at PAASS or other Board approved training programs by aerial applicators was the result of a proposal made by the ND Aerial Applicators Association, which requested additional training for aerial pesticide applicators.

The majority of the proposed rule changes are cosmetic in nature and are intended to make the rules easier for all to understand and are intended to improve transparency.

TAKINGS ASSESSMENT

This assessment is required by N.D.C.C. § 28-32-09.

1. For the taking assessment, subsection 1 of Section 28-32-09 sets forth six requirements, set forth in subdivisions “a” through “f,” but we understand that the Attorney General’s Office interprets Section 28-32-09 to require compliance with subsection 1 only if the proposed rules constitute a taking. It is our assessment that the likelihood that the proposed rules would result in a taking or a regulatory taking is minimal, if not non-existent. This is our assessment given the nature of the proposed rules and the definitions of “taking” and “regulatory taking” in subsection 3 of Section 28-32-09, as well as our understanding of the way in which the courts have addressed taking and regulatory taking claims under administrative regulations. In light of our assessment that the proposed rules do not implicate a taking, we don’t believe that we are required to address subdivisions “b” through “f” in Subsection 1 of Section 28-32-09. Nonetheless, we will do so.
2. The purpose of the proposed rules is to establish certification requirements for those who use and apply pesticides; establish safe practices for the handling, use, and storage of pesticides; set requirements that mitigate adverse consequences of accidental discharges; set record keeping and reporting requirements; improve training received by aerial pesticide applicators; and to conform state regulations with federal Environmental Protection Agency requirements. In sum, the proposed rules reduce the likelihood of misuse of pesticides and accidents with them, and that in turn protects humans, animals, and the environment.
3. The reason these proposed rules are needed to substantially advance the purposes is described in the preceding paragraph.
4. The potential cost to the state if a court determines that the proposed rules or any one of them constitutes a taking cannot be reliably estimated because of the great variance in circumstances under which a takings claim would be litigated and adjudicated. Further, we don’t, as stated, believe that there is any reasonable likelihood that the rules constitute a taking.
5. There is no fund identified in the agriculture department’s current appropriation that could be used as a source to pay compensation for a taking.
6. I certify that the benefits of the proposed rules exceed the estimated compensation costs.

Dated this 13 day of July, 2012.

By: Jim Gray, Division Director

Proposed ND Pesticide Rule Changes

ND Administrative Code (NDAC) Articles 60-01, 60-02, & 60-03

Article 60-01: General Administration: The only change needed was the update of the Department's email address.

Article 60-02: Rules of Practice and Procedure (repeal): The underlying general authority for 60-02 is derived from North Dakota Century Code (NDCC) 28-32 (Administrative Agencies Practice Act). The AG's office reviewed 60-02 – recommended the whole article be repealed.

Article 60-03: Pesticides: Most changes are general clean-up of language intended to improve clarity.

60-03-01-01. Scope (page 1): Propose repealing - contains no meaningful language.

60-03-01-03. Restricted use pesticides (page 6): Repeal; this section is essentially a definition

60-03-01-07.1 Report of loss records (page 18): Repeal for lack of statutory authority.

Significant Changes

60-03-01-02. Definitions (page 4 & 5):

Subsection (23) is the "repackaging" definition, adding "for the purposes of distribution", makes farm transfers of pesticides exempt from repackaging requirements.

Subsection (24) – Further defines spill kit as needing one or more impervious containers capable of holding 10 total gallons of liquid and \geq 50 lbs of absorptive material.

60-03-01-05. Categories (classes) of certification (pages 6 – 8):

1. Change "categories" to "classes" (PCB has authority to "classify" certifications under 4-35)
2. Change all references of "application or sale" to "use"
3. 60-03-01-05(3) – Change "Fumigation" to "Commodity and structural fumigation"
4. 60-03-01-05(12) "Metam-sodium" changed to "Sewer root control" (site of application)

60-03-01-05.1. Commercial or public applicator and dealer certification (page 8 – 9):

1. Propose new Subsection (3) - deferral for certificate holders unable to attend recertification training due to active duty military deployment.

2. Propose new Subsection (4) – requirement for commercially certified aerial applicators to attend a professional aerial applicators’ support system (PAASS) program or other Pesticide Control Board-approved program at least once every three years before recertification is issued.

60-03-01-05.2. Private applicator certification (pages 10 & 11):

1. Subsection (3) - reword to clarify the requirement for private applicators using restricted use fumigants for agricultural commodities to obtain certification in the “commodity and structural” fumigation class.
2. Propose new Subsection (4) - add requirement for private applicators using restricted use fumigants for rodents to be certified in the “vertebrate” class.
3. Proposed new Subsection (6) - deferral for certificate holders unable to attend recertification training due to active duty military deployment.

60-03-01-05.4. Certification denial (pages 11 & 12):

Propose adding language to Subsection (1) to allow refusing the issuance of certification to certified or uncertified individuals who have committed pesticide violations of FIFRA or state, province or tribal regulations.

60-03-01-06. Pesticide mixing, filling, & application – Storage – Transportation – Disposal (pages 12 - 14):

1. Subsection (1) (h) - change to expand spill kit requirement to public applicators.
2. Subsection (2) (d) - add “containing products intended for distribution or use by commercial or public applicators” to create exemption for private applicators, homeowners, and others from the requirement to have signage at storage sites.
3. Subsection (2) (f) - add language for unattended storage areas requiring they be locked and that “the structural integrity of the area prevents access by other than normal means”.
4. Propose new Subsection (3) (c) – secure pesticides in unattended vehicles.

60-03-01-07. Recordkeeping – dealers – commercial or public applicators and private applicators (pages 15 & 16):

1. Propose requirement for EPA numbers to be included in dealer’s purchase and sales records (Subsections (1)(a)(2) & (1)(b)(4)).

2. Propose amending Subsection (1) - allow certified applicators to authorize other individuals to receive and sign for RUPs on their behalf.
3. Propose new language to Subsection (2) - require commercial & public applicators to complete records within 24 hours of application.

60-03-01-10. Labeling and relabeling of bulk pesticides (page 19): Propose new language to Subsection (2) - clarify appropriate EPA establishment number required on bulk tanks and add requirement for persons storing bulk pesticides to label tanks with their business name & address.

60-03-01-11.1. Adoption of the Environmental Protection Agency pesticide container regulations (page 20): Propose new chapter, adopting container portions of federal rule, giving the Department authority to regulate under state credentials

60-03-01-11.2. Permanent containment area: construction – inspection – maintenance – recordkeeping requirements (pages 20 & 21). (Proposed new chapter)

1. Subsections (1) & (2) formally under 60-03-01-11. – moved to this chapter for better fit
2. Subsection (3) - prohibits open drains from being located in a permanent containment area
3. Subsection (4) requires protection of appurtenances (hoses, pumps, valves, pipes, etc.)
4. Subsection (5) expands on Subsection (4) by only allowing appurtenances, outlets, or drains to be configured through the walls only of adjacent containment structures
5. Subsection (6) requires monthly inspections of containment areas
6. Subsection (7) requires that repairs are initiated on the same day damage is identified in a permanent containment area
7. Subsection (8) requires records of inspection and maintenance

60-03-01-13. Prohibitions

1. Proposed new Subsection (2) prohibiting custom blends and mixtures from being held in inventory. An end user must have specifically requested the mixture/custom blend.

CHAPTER 60-03-03 - WORKER PROTECTION STANDARD (WPS) (pg 24)

Propose to adopt the most current version of the federal WPS as written.

**Summary of Proposed Changes to North Dakota
Pesticide Administrative Rules
North Dakota Administrative Code (NDAC) 60-01, 60-02, and 60-03**

Under Chapter 4-35 of the North Dakota Century Code, the Pesticide Control Board is directed to administer the Pesticide Act and is provided authority to adopt administrative rules to implement the Act. The North Dakota pesticide administrative rules are found in Titles 60-01, 60-02, and 60-03 of the North Dakota Administrative Code (N.D.A.C.).

Significant changes were made to the Pesticide Act during the 2009 Legislative Assembly. Changes are now being contemplated to the pesticide administrative rules. The proposed significant changes include:

1. Improved readability

Major changes were made to the pesticide law in 2009 to reword the statute into plain, easy to understand language. This was done to increase comprehension, improve transparency, and hopefully increase compliance. The majority of proposed changes to the administrative rules are to similarly improve readability and increase compliance.

2. Clarifying commercial certification classes

Twelve different commercial certification classes are found in N.D.A.C. 60-03-01-05. However, individuals are not always clear which category they need in a given situation. Proposed changes to N.D.A.C. 60-03-01-05 are intended to clarify when each certification class is needed.

3. Adding military deferment provisions

Proposed changes to N.D.A.C. 60-03-01-05.1 and 60-03-01-05.2 would grant a deferral from recertification deadlines for all certified applicators deployed on active military duty. Under the proposed changes, those persons on active duty could apply for an extension of their active certification status for a time period not to extend beyond April first of the year following their return from active duty.

4. Adding language to meet equivalency for federal bulk container/containment regulations

On August 16, 2011, the U.S. EPA implemented a federal regulation that established containment requirements for bulk pesticide facilities, as well as other requirements for pesticide containers. Proposed changes to 60-03-01-11.1 and 60-03-01-11.2 will allow North Dakota to adopt those federal requirements under state authority and ensure that our rules are equivalent to EPA's. The proposed changes would require bulk facilities to conduct monthly inspections, keep inspection records, and promptly repair cracks or other damage to containment structures.

The proposed changes would also require facilities to protect hoses, valves, and other appurtenances from damage resulting from operating personnel and moving equipment.

5. Expanding spill kit requirements

N.D.A.C. 60-03-01-06 currently requires that only commercial pesticide applicators have a spill kit at a loading site. Proposed changes to this section would also require all public applicators to have a spill kit sufficient to clean up a five gallon spill of a liquid product.

6. Exempting some pesticide users from storage signage requirements

The current language in N.D.A.C. 60-03-01-06(2)(d) requires that all pesticide storage areas be marked with signage at all entrances. Taken literally, this would require all areas containing any pesticide, such as a homeowner's garage or a janitor's closet, be marked with a pesticide storage sign. The proposed changes to this subsection will exempt residential and farm pesticide storage areas from the signage requirement. The new language will also exempt areas storing only hard surface disinfectants (such as a janitor's closet).

7. Adding discretionary authority for pesticide certification applications

As they are currently written, the administrative rules do not provide authority to deny a person's application for certification, even if they have a history of violations or other locations. The proposed changes to N.D.A.C. 60-03-01-05.4 would allow NDSU to deny a certification application to any individual that has committed a documented violation of FIFRA or the pesticide regulations of any state, province or tribal authority within the last three years.

8. Requiring additional training for recertifying aerial applicators

The current language 60-03-01-05.1 holds all individuals certified as commercial applicators, public applicators and dealers to the same standard when it comes to the recertification process. The proposed changes to 60-03-01-05.1 would require individuals holding an aerial core commercial or aerial core public applicator certificate to attend a professional aerial applicators' support system (PAASS) program or other Pesticide Control Board-approved program at least once every three years before recertification is issued. This additional requirement in order to recertify as an aerial applicator was brought forth by the ND Aerial Applicator's Association as a way to ensure that their industry remains strong, well-informed and trained. After drafting the proposed language, the Pesticide Control Board approved of the language, which was forwarded to Dave Gust, ND Aerial Applicator's Association President. The Department also received a letter of support from the National Agricultural Aviation Research and Education Foundation.