

ND Legislative Council
Administrative Rules Committee
December 12, 2012

Testimony by: Tom Bachman
ND Department of Health

Mr. Chairman and members of the committee, my name is Tom Bachman and I am with the Air Quality Division of the Health Department. I am here to address changes to Article 33-15, Air Pollution Control.

1. The rule changes do not result from any statutory changes made by the legislature.
2. The changes to the rules are related to rules adopted by EPA under the Clean Air Act. The rule changes were made to update state rules to match federal rules. The primary reason for adopting these revisions was to maintain primacy for the major air pollution control programs in North Dakota. The Department could choose not to adopt the Federal rules, but would lose the authority to regulate certain portions of the Clean Air Act and the State could face sanctions.
3. The process of adopting amendments to the North Dakota Air Pollution Control Rules involves the review by the Air Pollution Advisory Council, a public notice, a public hearing and comment period, response to any comments, approval of the final draft by the Air Pollution Advisory Council, the State Health Council, and the Attorney General. Public notice regarding the hearing for these rules and the public comment period was given by an abbreviated notice published twice in all 53 official county newspapers as well as a press release, notification to the legislative council and an announcement on the Department's website. The public hearing regarding the amendments was held on April 10, 2012.

The rules were approved by the Air Pollution Advisory Council on June 14th, by the Attorney General on July 31st, and by the State Health Council on August 14th. The rules were submitted to the Legislative Council on August 14th.

4. During the public hearing, no oral comments were received. Written comments were received from one individual and the U.S. Environmental Protection Agency. The individual indicated that the changes to Chapter 33-15-15, Prevention of Significant Deterioration, should include a requirement to give public notice and provide for public review on the Department's guidance, interpretations, and approval of technical inputs for dispersion modeling – The Department currently does provide for public review all aspects of the dispersion modeling as part of the public comment period already required under the rule. No changes were made based on this comment.

EPA did not provide any comments on the rule changes that were proposed. However, EPA urged the Department to revise several other sections of the rules that contain what

they call "Director's Discretion". – The Department will review EPA's request and take action at a later date.

5. The approximate cost of giving public notice, holding a hearing, developing and adopting the rules is \$4,000.
6. The rule revisions updated State rules to match Federal rules. This included changes to the Standards of Performance for New Stationary Sources, Prevention of Significant Deterioration, Title V Permit to Operate program, Acid Rain Program, and Emissions Standards for Hazardous Air Pollutant for Source Categories. The changes also provide for a new General Permit to Construct and provides a new fee of \$150 for oil and gas well registration with the Department.
7. A Regulatory Analysis was prepared. There were no requests for the analysis. A copy is attached to my testimony.
8. A Small Entity Analysis was not required.
9. The oil and gas well registration fee will have an effect on State revenues. The fee of \$150 per well is expected to generate approximately \$225,000 to \$300,000 per year. The fees will be deposited in the Health Department's Air Pollution Control Program "Air Contaminant Fee Minor" fund. A copy of the Fiscal Note is attached to my testimony. No other rule changes will significantly affect revenues or expenditures.
10. A Constitutional Takings Assessment was prepared. A copy of the assessment is attached to my testimony.
11. These rule revisions were not adopted as emergency rules.

At this time, I will be happy to answer any questions you may have.

RULE REVISION ANALYSIS AND ASSESSMENT

I. NDCC 28-32-08 Regulatory Analysis

Background

Section 28-32-08 of the North Dakota Century Code requires the Department to issue a regulatory analysis on any rule revision if a request for the analysis is filed by the Governor or a member of the Legislature within 20 days after the last published notice of the proposed rule hearing or if the proposed rule is expected to have an impact on the regulated community in excess of \$50,000. The following analysis is prepared to comply with the requirements of that section, and is being prepared for the following chapters of the Air Pollution Control Rules under consideration:

Chapter 33-15-01 -	General Provisions
Chapter 33-15-03 -	Restriction of Emissions of Visible Air Contaminants
Chapter 33-15-05 -	Emissions of Particulate Matter Restricted
Chapter 33-15-12 -	Standards of Performance for New Stationary Sources
Chapter 33-15-14 -	Designated Air Contaminant Sources, Permit to Construct, Minor Source Permit to Operate, Title V Permit to Operate
Chapter 33-15-15 -	Prevention of Significant Deterioration of Air Quality
Chapter 33-15-17 -	Restriction of Fugitive Emissions
Chapter 33-15-21 -	Acid Rain Program
Chapter 33-15-22 -	Emission Standards for Hazardous Air Pollutants for Source Categories
Chapter 33-15-23 -	Fees

Classes of People Probably Affected

Proposed amendments to the Air Pollution Control Rules have the potential to affect a wide variety of businesses and industries that emit air contaminants. The industries most affected are the oil and gas industry, operators of petroleum refineries and organic liquids distribution facilities.

Probable Impact Including Economic Impact

Most of the changes that are being proposed will have no additional impact for regulated sources. The changes to Chapters 1, 3, 5, 12, 14, 15, 21 and 22 are being made to be consistent with existing federal rules and requirements. Since affected sources must comply with the federal rules, implementation by the Department will not have any additional impact.

A change to Chapter 23 will increase costs for the oil and gas industry. The change will require a one hundred fifty dollar filing with the submittal of their oil and gas well registration form. The estimated annual cost based on current oil and gas well development is two hundred thousand to three hundred thousand dollars.

Probable Costs to the Department

The revisions will not have a significant cost to the Department. Revisions to Chapter 14 and 15 will reduce permitting requirements for the Department and thus reduce costs.

Alternative Methods Considered

The changes to Chapters 1, 3, 5, 12, 14, 15, 17, 21 and 22 are being made to be consistent with the Clean Air Act. The Department could choose to not adopt the federal regulations; however, EPA would then disapprove North Dakota's programs. This could mean a loss of highway construction funds, requirements for new sources to obtain emissions offsets and much higher fees under Title V.

The alternative to collecting the fees for oil and gas wells would be no fees. The Department believes collection of the fees is consistent with the fees already collected from other air pollution sources. The fees will help defray some of the costs of enforcing the air pollution control requirements for oil and gas wells.

II. NDCC 28-32-09 Takings Assessment

Background

This section of the North Dakota Century Code requires the Department to prepare a written assessment of the constitutional takings implication of a proposed rule that may limit the use of private real property. The assessment must:

- a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
- b. Clearly and specifically identify the purpose of the proposed rule.
- c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.
- d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
- e. Identify the source of payment within the agency's budget for any compensation that may be ordered.
- f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

Assessment

- a. The proposed rules update the North Dakota Air Pollution Control Rules to be consistent with the Clean Air Act and the rules promulgated thereunder. The proposed rules will not limit the use of landowner's private real property. The rules are in accordance with State and Federal law and their adoption is therefore not a "regulatory taking."
- b. The purpose of the proposed rules are to update existing State rules to be consistent with federal requirements, and provide clarifications and updates.

- c. No alternative action is available for federal rules that are being adopted. The changes to Chapters 14 and 15 will reduce costs for both affected sources and the Department.
- d&e For federal rules that are being adopted by reference, affected sources are already subject to them and State adoption will not change that fact. The other changes do not affect any private real property.
- f. Implementation of federal rules by the State generally produce lower costs.

III. NDCC 23-25-03.3 Requirements for rules more strict than Federal Standards (or no corresponding federal rules)

Background

This section of the North Dakota Century Code requires the Department to provide a risk assessment for any rules that affect coal conversion and associated facilities, petroleum refineries, or oil and gas production and processing facilities that are proposed for adoption that are more stringent than federal requirements or when there are no corresponding federal rules. This risk assessment would include a demonstration of a substantial probability of significant impacts to public health or property, a cost-benefit analysis that affirmatively demonstrates that the benefits of the more stringent or additional state rules and standards will exceed the anticipated costs, and the independent peer reviews required by this section of the Century Code.

Analysis

The proposed rule changes incorporate changes to federal rules. These changes are not more stringent than the underlying federal requirements. Although fees will be charged for oil and gas operations, the rule revisions do not provide any additional control requirements.

IV. NDCC 23-01-04.1 Stringency Determination and Justification

Background

Section 23-01-04.1 requires the North Dakota Department of Health to make a written finding that any corresponding federal regulations are not adequate to protect the State's public health and environmental resources when adopting more stringent rules. This requirement is addressed with the information which follows.

Explanation

Chapter 33-15-01 - General Provisions

A baseline date for incorporation by reference is being updated. Therefore, the change is equivalent to federal requirements.

The change to 33-15-01.13.3 eliminates a conflicting and redundant requirement.

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

In Subsection 33-15-03-04.4, the change removes a provision that appears to conflict with federal requirements. Therefore, this change does not make the rule more stringent than federal requirements. In Subsection 33-15-03-04.5, the additional language that is added was moved from Chapter 33-15-17. Therefore, the requirement is no more stringent than current requirements.

Chapter 33-15-05 - Emissions of Particulate Matter Restricted

The removal of 33-15-05-01.2.a(1) makes the North Dakota rules consistent with federal rules. There is no comparable federal rule. Malfunctions and shutdowns of air pollution control equipment are handled under 33-15-01-13.

The addition to Subsection 33-15-05-04.3 makes the North Dakota rules consistent with federal rules.

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

The addition or revision of the rules were made to be consistent with the federal rules. Therefore, there is no change in the stringency of the federal rules.

Chapter 33-15-14 - Designated Air Contaminant Sources, Permit to Construct, Minor Source Permit to Operate, Title V Permit to Operate

The changes to Section 2 reduce the permitting burden. The changes to Section 6 update the rules to match Federal requirements. Therefore, there is no change in the stringency of the comparable Federal rule.

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

The changes incorporate by reference the latest version of the Federal rules. Therefore, there is no change in the stringency of the comparable federal rule.

Chapter 33-15-17 - Restriction of Fugitive Emissions

The deletion of 33-15-17-02.6 makes North Dakota's rules consistent with federal rules which do not allow farms to violate Ambient Standards or PSD increments.

Chapter 33-15-21 - Acid Rain Program

The baseline date for incorporation of the federal Acid Rain Program rules by reference is being updated. Therefore, there is no change in the stringency of the comparable federal rule.

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

The changes to this Chapter revise the baseline date for incorporating by reference existing federal regulations and incorporate by reference a standard for reciprocating internal combustion engines. Therefore, the changes are no more stringent than federal requirements.

Chapter 33-15-23 - Fees

The changes to this chapter do not impose any emission limits or requirements. They just address fees.

V. NDCC 28-32-08.1 Small Entities Analysis

Nearly all of the changes to the State Air Pollution Control Rules are mandated by changes to federal rules. Small entities are subject to the rules whether the Department adopts them or not. The proposed fee for oil and gas wells is not expected to affect any small entities as defined in NDAC 28-32-08.1.

FISCAL NOTE

Revision Summary: The addition of 33-15-23-06 will add an oil and gas well registration fee of one hundred fifty dollars (\$150) per well.

Effect on State Revenue: The new fee is expected to generate between \$225,000 and \$300,000 per year. The fees generated will be deposited in the Department of Health's Air Pollution Control "Air Contaminant Fee Minor" fund.

Effect on State Expenditures: None