

ND Legislative Council
Administrative Rules Committee
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Testimony by: Terry O'Clair
ND Department of Health

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

1. The Air Pollution Control rule changes do not result from any statutory changes made by the legislature.
2. The changes to the rules are related to rules adopted by EPA under the Clean Air Act. The rule changes were made to update state rules to match federal rules and be consistent with federal requirements. The primary reason for adopting these revisions was to maintain primacy for the major air pollution control programs in North Dakota. The Department could choose not to adopt the Federal rules, but would lose the authority to regulate certain portions of the Clean Air Act and the State could face sanctions.
3. The process of adopting amendments to the North Dakota Air Pollution Control Rules was in accordance with NDAC 28-32, NDAC 23-25 and 40 CFR 51.102. This included approval by the Air Pollution Advisory Council on January 7th and State Health Council on February 24th. The public hearing regarding the amendments was held on November 10, 2015.

The rules were approved by the Air Pollution Advisory Council on January 21st and submitted to the Legislative Council on February 25th.

4. During the public hearing, no oral comments were received. Written comments were received from the American Coatings Association which supported our changes and one individual that did not support any changes that did not preserve or enhance air quality at oil and gas facilities. The amendments do not reduce any requirements that would adversely affect air quality. The approximate cost of giving public notice, holding a hearing, developing and adopting the rules is \$5,200.
5. The revisions updated State rules to be consistent with Federal rules and requirements. This included changes to the Standards of Performance for New Stationary Sources, Prevention of Significant Deterioration, permitting rules and Emissions Standards for Hazardous Air Pollutant for Source Categories. The changes also increase the one-time filing fee for a Permit to Construct.
6. A Regulatory Analysis was prepared. There were no requests for the analysis. A copy is attached to my testimony.

7. A Small Entity Analysis was prepared and is also attached.
8. The rule changes will not significantly affect revenues or expenditures. A Fiscal Note was prepared and is attached to the proposed rule revisions.
9. A Takings Assessment was prepared. A copy of the assessment is attached to my testimony.
10. 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 33-15-12 -	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 33-15-20 -	Control of Emissions from Oil and Gas production Facilities
Chapter 33-15-22 -	Emission Standards for Hazardous Air Pollutants for Source Categories
Chapter 33-15-23 -	Fees
Chapter 33-15-25 -	Regional Haze Requirements

Classes of People Probably Affected

Proposed amendments to the Air Pollution Control Rules have the potential to affect a wide variety of businesses and industries that emit air contaminants. The industries most affected are the industrial/commercial/institutional boilers, oil and gas production and power plants. Permit to Construct applicants will also be affected.

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, 12, 15, 22 and Section 6 of Chapter 14 are being made to be consistent with existing federal rules and requirements. Since affected sources must comply with the federal rules, implementation by the Department will not have any additional impact.

The changes to the other chapters, except those to Chapter 23, are minor clarifications and updates that are not expected to have any impact on regulated sources. The fee increase in Chapter 23 is expected to cost Permit to Construct applicants \$14,000 to \$17,500 per year.

Probable Costs to the Department

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

Alternative Methods Considered

The changes to Chapters 1, 3, 12, 15, 22 and Section 6 of Chapter 14 are being made to be consistent with the Clean Air Act. The Department could choose to not adopt the federal regulations; however, EPA would then disapprove North Dakota's programs. This could mean a loss of highway construction funds, requirements for new sources to obtain emissions offsets and much higher fees under Title V.

The changes to the other chapters are clarifications to the rules, changes to public comment procedures and an increase in the Permit to Construct filing fee. The clarifications and public comment procedures will maintain the current method of enforcing the rules and lessen the burden on the Department for public comment. The Department could choose not to make these changes; however, the changes make implementation easier.

The Department considered not implementing the filing fee increase. However, the current system does not collect fees sufficient to cover the Department's cost of reviewing a minor Permit to Construct application. The change will collect sufficient fees and will make the cost of processing the application consistent with the processing of major source applications where the applicant is billed for the actual amount it cost for processing the application.

II. NDCC 28-32-09 Takings Assessment

Background

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

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

Assessment

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

- b. The purpose of the proposed rules are to update existing State rules to be consistent with federal requirements, and provide clarifications and updates.
- c. No alternative action is available for federal rules that are being adopted. The changes to Chapters 14, 20 and 23, lessen the burden for notifying local officials regarding permits, clarify existing rules and increase a fee for a permit applicant.
- d&e For federal rules that are being adopted by reference, affected sources are already subject to them and State adoption will not change that fact. The other changes do not affect any private real property.
- f. Implementation of federal rules by the State generally produce lower costs.

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

Background

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

Analysis

The proposed rule changes incorporate changes to federal rules or provide clarification of existing rules. These changes are not more stringent than the underlying federal requirements. The changes to Chapter 20 clarifies that all oil and gas production facilities are subject to the rule which is consistent with its implementation since in 1987. The changes to the chapter also provide more time to submit the registration form required by the rule. The fee increase in Chapter 23 is consistent with NDCC 23-25-04.2, Fees, which allows the Department to collect fees to cover its costs for processing permit applications.

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

Background

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

Explanation

Chapter 33-15-01 - General Provisions

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

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

Subsection 33-15-03-04.3 is being deleted based on an EPA SIP Call which indicated the subsection was inconsistent with the Federal Clean Air Act.

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

The only revision of the rule was the date for incorporation by reference. This change makes the chapter 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

Public comment requirements were added to the General Permit to Construct requirements in 33-15-14-02.1.c because EPA indicated it was not approvable because it did not comply with Federal Clean Air Act.

The changes to the Permit to Construct and Minor Source Permit to Operate rules allow the Department to post the application, proposed permit and the Department's analysis on its website rather than sending it to local officials. This will save resources and is consistent with EPA's interpretation of the Federal Clean Air Act.

The change to the language on permit terms clarifies the method already in use.

The changes to the Title V Permit to Operate rules are consistent with 40 CFR 70.

Therefore, the changes are no more stringent than Federal requirements.

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

The changes incorporate by reference the latest version of the federal rules and the U.S. Supreme Court's interpretation of those rules. Therefore, there is no change in the stringency of the comparable federal rule.

Chapter 33-15-20 - Control of Emissions from Oil and Gas Production Facilities

The changes provide clarification that the chapter is applicable to all actively producing oil and gas wells. This is the way this chapter has been implemented since 1987. Therefore, there is no increase in the stringency of the rule. The change actually allows 30 more days than the current rule to submit a registration form.

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. Therefore, the change is no more stringent than federal requirements.

Chapter 33-15-23 - Fees

The change to this chapter does not impose any emission limits or requirements. It increases the Permit to Construct filing fee based on the anticipated cost of processing the application as required by NDCC 23-25-04.1. The Federal Clean Air act requires a State to collect adequate fees to support the air pollution control program. This change will help meet that requirement.

V. NDCC 28-32-08.1 Small Entities Analysis

1. Regulatory Analysis

Nearly all of the changes to the State Air Pollution Control Rules are mandated by changes to federal rules. Small entities are subject to the rules whether the Department adopts them or not. The other changes to the rules are clarifications that do not affect existing requirements or, reduce the effect on small entities. The increase in fees is expected to have small economic impact on small entities as it only increases the fee from \$150 to \$325 on a one time basis.

Explanation

Chapter 33-15-01 - General Provisions

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

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

33-15-03-04.3 – This subsection is being eliminated. This change is made to comply with the requirements of Section 110 of the Clean Air Act and 40 CFR 51.

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

The changes incorporate by reference rules from 40 CFR 60.

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

The public comment provisions that are added to 33-15-14-02.1.c are necessary to comply with the Federal Clean Air Act.

The changes to the requirements to supply local officials a copy of the permit application, the proposed permit and the Department's analysis only affects the local officials (generally the city or county auditor) and reduces the amount of paper sent to their office. The department views this as a benefit to local officials.

The changes to the rule regarding permit terms clarifies that permits have a maximum term of five years and will not change emission control requirements for small entities.

The changes to 33-15-14-06 are made to be consistent with 40 CFR 70 and will have no effect on small entities since they are subject to requirements whether the Department adopts the change or not.

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

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

Chapter 33-15-20 – Control of Emissions from Oil and Gas Production Facilities

The changes clarify the applicability of the chapter and provide more time for submitting the registration form. These changes do affect any emissions control requirements. Generally, the sources affected are not small entities.

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

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

Chapter 33-15-23 - Fees

The change to the fees for a Permit to Construct does not put any more regulatory requirements on the applicant.

2. Economic Analysis

The changes to the rules are generally mandated by or are consistent with federal law (see above analysis). Small entities will be subject to the rules whether the Department adopts them or not.

The change to the Permit to Construct fee may have an economic impact on a very limited number of small entities. For the previous year, the Department has determined that only five Permit to Construct applicants were small entities as defined in NDCC 28-32-08.1. As such, the following economic impact statement is prepared:

- a) **The small entities subject to the proposed rule:** The sources subject to the proposed rule change could be any small entity that operates an air contaminant source that is required to obtain a Permit to Construct. In the past year this included operators of bean processing plants, crematoriums and soil remediation units.
- b) **The administrative and other costs required for compliance with the proposed rule:** The proposed fee is \$325 per application which is an increase of \$175 per application. This is a onetime fee for each application. There will be no additional costs for the Department.

- c) **The probable cost and benefit to private persons and consumers affected by the proposed rule:** The increase is \$175 per application. Any one small entity is not expected to submit more than one application per year for a total cost of \$325 per applicant or \$1,625 per year for all small entities. The benefit to private persons is that the Department will have sufficient funds to assure an adequate review of the permit application.
- d) **The probable effect of the proposed rule on state revenues:** It is expected that the change will generate an additional \$14,000 - \$17,500 per year. The fees generated will be deposited in the Department of Health's Air Pollution Control "Air Contaminant Fee Minor" fund.
- e) **Any less intrusive or less costly alternative methods of achieving the purposes of the proposed rule:** The Department could bill the applicant for the actual cost of processing the application as allowed by the current rule. This will require more work on the part of the Department to generate the bill and on the part the applicant to provide the payment. The Department believes that collecting an adequate fee up front for most minor source permit applications will reduce the workload on the Department and on the affected small entity.

FISCAL NOTE

Revision Summary: The change to the fee 33-15-23-02 will change the filing fee from one hundred fifty dollars (\$150) per application to three hundred twenty-five dollars per application.

Effect on State Revenue: The new fee is expected to generate between \$14,000 and \$17,500 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