

NORTH DAKOTA
DEPARTMENT OF HEALTH
Departmental Memorandum

TO: File

FROM: Division of Water Quality

RE: Comments on Proposed Amendments and Adoption of Administrative Rules Relating to the North Dakota Pollutant Discharge Elimination System

Bismarck, ND

DATE: March 5, 2018

On March 19, 2018, the North Dakota Department of Health (Department) held a public hearing to allow the public to submit information concerning the proposed amendments of N.D. Admin Code ch. 33-16-01 and the adoption of N. D. Admin Code ch. 33.1-16-01.

The purpose of the proposed amendments to North Dakota Pollutant Discharge Elimination System, N. D. Admin. Ch. 33-16-01, is to update the department's rules to provide clarification and reflect the change in U. S. Environmental Protection Agency rules regarding the National Pollutant Discharge Elimination System (NPDES) program. The need to update the department's rules was highlighted in *Coon v. North Dakota Department of Health*, 2017 ND 215. In addition, pursuant to Senate Bill No. 2327, the department's Environmental Health Section Chief is proposing to adopt the department's rules relating to the North Dakota Pollutant Discharge Elimination System program N.D. Admin. Code ch. 33-16-01 as the North Dakota Department of Environmental Quality's rules in N.D. Admin. Code ch. 33.1-16-01, with minor changes to reflect the creation of the new agency. If adopted, these rules will be effective upon establishment of the new agency. Comments regarding rules being transferred from the North Dakota Department of Health to the new North Dakota Department of Environmental Quality that are not being changed substantively from existing code are beyond the scope of this proceeding because the transfer of authority is mandated by S.B. 2327. However, where appropriate, the department has provided responses to aid the public's understanding of these rules.

A Notice of Intent to Amend and Adopt Administrative Rules and Notice of Public Hearing on the proposed rules was issued and posted on the department's web page as well as printed in the county papers of record. The public notice identified the purpose of the public notice, changes proposed by the department, where to obtain additional information regarding the proposed rules, where written comments could be directed, as well as the purpose and location of the scheduled public hearing.

The only comments received were those submitted by the Concerned Citizens of North Dakota. Below are summaries of their comments. Although there are specific responses to each comment, the document should be read in its entirety with the understanding that a response to one comment may be applicable to additional comments.

1. Comment: The department failed to require a sow CAFO near Buffalo, North Dakota, to obtain a NDPDES permit. The department needs to be held accountable for not requiring concentrated animal feeding operations to obtain NDPDES permits.

Department Response: The issue regarding whether a NDPDES permit was required for the sow facility near Buffalo, North Dakota, was determined by the Supreme Court in *Coon v. North Dakota Department of Health*, 2017 ND 215. That case highlighted the need to update the department's rules to ensure they are consistent with corresponding federal rules. In this rulemaking, the majority of the changes are to incorporate the current federal rules.

2. Comment: How will the department determine that monitoring will be at "appropriate frequencies and locations" under NDAC 33.1-16-01-01(3)(c)(2)?

Department Response: The department is not proposing to make substantive changes to this portion of the rule, so this comment is beyond the scope of this proceeding. But, NDDEQ will make such determinations using its best professional judgment, following applicable law and the science.

3. Comment: Is antibiotic resistant bacteria found in manure applied to soil considered "biological materials" that is a "pollutant" under NDAC 33.1-16-01-01(3)?

Department Response: The department is not proposing to make substantive changes to the definition of "pollutant" or define "biological materials", so this comment is beyond the scope of this proceeding. The definition of "pollutant" is consistent with the federal Clean Water Act, 33 U.S.C. § 1362(6).

4. Comment: The department must thoroughly review and address all questions and comments when responding to comments received under NDAC 33.1-16-01-07.1.

Department Response: The comment is noted.

5. Comment: The public notice procedures in NDAC 33.1-16-01-07(1)(a) are outdated.

Department Response: The department is proposing to amend this rule in subsection 1(e) to post on its website an annual invitation to be added to its mailing list, instead of publishing the invitation. The department also maintains an email subscription service that provides notification of public notices, available here <https://deq.nd.gov/subscriptions/>.

6. Comment: The phrase "public interest or raises major issues" in NDAC 33.1-16-01-08(1)(c) makes it seem as though important decisions are made arbitrarily.

Department Response: The department is not proposing to make substantive changes to this rule, so this comment is beyond the scope of this proceeding. The rule is consistent with federal requirements for state NPDES programs, 40 C.F.R. § 124.8(a).

7. Comment: A clear definition needs to be provided for "trade secret" as used in NDAC 33.1-16-01-10(1).

Department Response: The department is not proposing to make substantive changes to this rule, so this comment is beyond the scope of this proceeding. “Trade secret” is defined in N.D.C.C. § 44-04-18.4.

8. Comment: Various subsections in NDAC 33.1-16-01-25 and NDAC 33.1-16-01-26.1 use the term “may.” The use of the term “may” should be removed and replaced with “will.”

Department Response: The only change proposed for these rules is to update them to incorporate by reference the most recent version of the corresponding federal rules, so this comment is beyond the scope of this proceeding. The use of “may” gives the department the flexibility to take what it deems appropriate action during various circumstances.

9. Comment: These changes to the NDPDES permit process are long overdue – CAFOs should obtain the required NDPDES permit to protect North Dakota citizens and waters.

Department Response: The comment is noted.