

North Dakota Legislative Council

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September 3, 2010

SEP 09 2010

Ms. Illona A. Jeffcoat-Sacco
Executive Secretary
Public Service Commission
State Capitol
Bismarck, ND 58505-

PUBLIC SERVICE COMMISSION

ADMINISTRATIVE RULES COMMITTEE MEETING

The Legislative Management's Administrative Rules Committee reviews all rules recently adopted by administrative agencies. The committee will hold its next meeting on Tuesday, September 14, 2010, in the Roughrider Room, State Capitol.

You are invited to appear before the committee and describe the procedure followed by the Public Service Commission in adopting the rules published in the October 2010 supplement to the North Dakota Administrative Code.

You are tentatively scheduled to appear before the committee at 1:00 p.m. Enclosed is a copy of the agenda for your reference. If you or a representative are unable to appear at that time, please notify me as soon as possible.

With respect to the rules published in the October 2010 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.
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.
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.
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.
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.
6. An explanation of the subject matter of the rules and the reasons for adopting those rules.

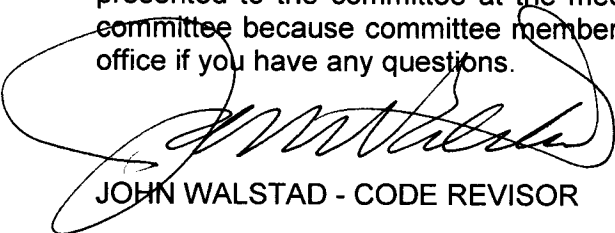
26 PU-10-159 Filed 09/09/2010 Pages: 16
Letter Requesting Testimony at September 14, 2010 Admin. Rules Committee Meeting
Legislative Council

25 WM-10-63 Filed 09/09/2010 Pages: 16
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Legislative Council

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

Please provide the committee with **written** testimony.

Enclosed is a copy of the October 2010 rules of the Public Service Commission in the form they will be presented to the committee at the meeting. The page numbers should be used as references for the committee because committee members will have pages with the same numbering. Please contact this office if you have any questions.



JOHN WALSTAD - CODE REVISOR

JW/AL
Encs.

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Tentative Agenda

ADMINISTRATIVE RULES COMMITTEE

Tuesday, September 14, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

- 9:00 a.m. Call to order
Roll call
Consideration of the minutes of the previous meeting
- 9:05 a.m. Presentation by a representative of the Attorney General's office regarding agency authority to impose penalties by administrative rules
- 9:20 a.m. Presentation by a representative of the State Gaming Commission regarding rules of the State Gaming Commission carried over for consideration from the previous committee meeting
- 9:40 a.m. Presentation by a representative of the State Department of Health regarding rules of the department carried over for consideration from the previous committee meeting (pages 61-120)
- 10:00 a.m. Presentation by a representative of the State Board of Examiners for Nursing Home Administrators regarding rules of the board carried over for consideration from the previous committee meeting
- 10:20 a.m. Break
- 10:40 a.m. Presentation by a representative of the Marriage and Family Therapy Licensure Board regarding rules of the board carried over for consideration from the previous committee meeting (pages 377-417)
- 11:00 a.m. Presentation by the State Board of Registration for Professional Engineers and Land Surveyors regarding October 2010 rules of the board (pages 1-48)
- 11:20 a.m. Presentation by a representative of the Game and Fish Department regarding October 2010 rules of the department (pages 49-60)
- 11:40 a.m. Presentation by a representative of the Board of Pharmacy regarding October 2010 rules of the board (pages 121-124)
- 12:00 noon Luncheon recess
- 1:00 p.m. Presentation by a representative of the Public Service Commission regarding October 2010 rules of the commission (pages 125-136)
- 1:20 p.m. Presentation by a representative of the Department of Human Services regarding October 2010 rules of the department (pages 137-376)
- 1:40 p.m. Presentation by the Legislative Council staff of a memorandum on 2009-10 rulemaking statistics
- 1:50 p.m. Committee discussion and directives relating to the committee report to Legislative Management
- 2:00 p.m. Adjourn

Committee Members

Senators Jerry Klein (Chairman), John M. Andrist, Tom Fischer, Layton W. Freborg, Joan Heckaman, Tracy Potter

Representatives Wesley R. Belter, Randy Boehning, Stacey Dahl, Chuck Damschen, Duane DeKrey, Mary Ekstrom, Jim Kasper, George J. Keiser, Kim Koppelman, Joe Kroeber, Jon Nelson, Blair Thoreson, Francis J. Wald, Lonny Winrich, Dwight Wrangham

Staff Contact: John Walstad, Code Revisor

TITLE 69
PUBLIC SERVICE COMMISSION

OCTOBER 2010

CHAPTER 69-09-09

69-09-09-06. Decommissioning plan. Prior to commencement of operation of a commercial wind energy conversion facility or wind turbine, the facility or turbine owner or operator shall file for commission review the estimated decommissioning cost per turbine, in current dollars at the time of filing, for the proposed facility or turbine and a comprehensive decommissioning plan that describes any expected effect on present and future natural resource development and how the facility or turbine owner or operator plans to pay for decommissioning the facility or turbine as required by section 69-09-10-05 at the appropriate time. The commission may at any time require the owner or operator of a commercial wind energy conversion facility or wind turbine to file a report with the commission describing how the facility or turbine owner or operator is fulfilling this obligation.

History: Effective October 1, 2008; amended effective October 1, 2010.

General Authority: NDCC 28-32-02, 49-02-27

Law Implemented: NDCC 49-02-27

CHAPTER 69-10-03

69-10-03-02. Adequate standards. A standard used to certify any commercial weighing and measuring device must be annually certified as traceable by a NIST-recognized metrology laboratory. The ~~state metrologist commission~~ may extend the twelve-month recertification interval up to fifteen months.

A current legible copy of the certificate of traceability must be maintained with the commission.

Annual recertification is subject to the following exceptions and conditions:

1. The standards integral to and used for recertification of a commercial automatic bulk-weighing system must be certified traceable by a NIST-recognized laboratory at least once every five years.
2. The volumetric provers used to certify loading-rack meters must be certified traceable by a NIST-recognized laboratory at least once every three years.
3. Unless otherwise approved by the commission, the operator of a coal belt conveyor scale jurisdictional to the commission must conduct a material load test at least once every two years provided that electronic or other simulated load testing is done at least once every three months.
4. A master meter may not be used as a standard to certify commercial LPG devices.
5. Notwithstanding the other provisions of this section, the commission may require recertification of any standard if upon inspection the physical condition of a standard indicates a need for recertification.

History: Amended effective April 1, 1992; September 1, 1994; February 1, 1996; July 1, 1997; July 1, 2008; October 1, 2010.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02, 64-02-13

~~**69-10-03-05. Weight carts.** Effective January 1, 2002, weight carts not already in service in North Dakota and seeking metrology certification must meet the following design specifications: wheelbase must not exceed sixty inches [152.4 centimeters], motors must be electric or powered by gel-core batteries, gross weight must not exceed five thousand pounds [2267.95 kilograms], tires must be of solid rubber with smooth tread, and sealing cavities must be capable of containing twenty pounds [9.072 kilograms] of lead adjustment. Repealed effective October 1, 2010.~~

~~**History:** Effective January 1, 2002.~~

~~**General Authority:** NDCC 64-02-03~~

~~**Law Implemented:** NDCC 64-02-02~~

69-10-03-06. Metrology service. ~~Metrology service at the commission laboratory will only be provided as set out in this section:~~

- ~~1. All metrology service requests must be by appointment only and will be according to the following:
 - ~~a. Testing and safety division metrology;~~
 - ~~b. State-registered service company metrology;~~
 - ~~c. North Dakota law enforcement metrology;~~
 - ~~d. Industrial customer metrology; and~~
 - ~~e. All other metrology.~~~~
- ~~2. The director shall send out annual appointment notifications by mail to all state-registered service companies at least thirty days prior to each company's appointment date.~~
- ~~3. If a party with a scheduled metrology appointment needs to cancel that appointment, the party shall notify the commission of the need to cancel at least seven days in advance of the appointment. Appointments cancelled within less than seven days advance notice will lose scheduling priorities. The party canceling a metrology appointment may request a new appointment date at that time.~~
- ~~4. A metrology appointment must be scheduled at least thirty days in advance.~~
- ~~5. A metrology request not previously scheduled may only be serviced as time becomes available.~~
- ~~6. A metrology request for service beyond the scope of the laboratory's recognition level will be referred to an appropriate NIST-recognized metrology laboratory. Repealed effective October 1, 2010.~~

History: ~~Effective May 1, 2005; amended effective July 1, 2008.~~

General Authority: ~~NDGG 64-02-03~~

Law Implemented: ~~NDGG 64-02-02~~

69-10-03-07. Delivery of standards for certification. ~~Standards delivered to the metrology laboratory for testing and certification must be submitted undamaged and serviceable and must comply with the following:~~

- ~~1. Vehicle scale test carts must be cleaned and painted with all fluid levels topped off to their calibrated reference levels.~~

- ~~2. Cast iron weights must be cleaned and painted following the requirements in NIST Handbook No. 105-1, section 2, as adopted by reference in section 69-10-03-01.2.~~
- ~~3. Provers and test measures, including sight glasses, must be cleaned inside and out and contain no hydrocarbon residue or other pollutants.~~
- ~~4. Provers must have a simple, sturdy, and adequate leveling means on the legs allowing for adequate adjustments.~~
- ~~5. Provers must have two level indicators mounted on the body of the prover at right angles to each other for leveling purposes.~~
- ~~6. Mild steel provers must be periodically painted as determined by the metrologist, and as recorded in the remarks section on the previous year's calibration report.~~
- ~~7. Mild steel test measures, including sight glasses, must be cleaned inside and out and contain no hydrocarbon residue or other pollutants.~~
- ~~8. Glass F weights must meet the applicable material and design requirements of NIST Handbook No. 105-1, as adopted by reference in section 69-10-03-01.2.~~
- ~~9. Fabricated weights, brass weights, and cast iron weights equal to or less than ten pounds [4.54 kilograms] may not be used.~~
- ~~10. Laminated weights must not be adjusted and must be removed from service when the weights fail to maintain the applicable tolerance.~~
- ~~11. Volume standards placed in service after January 1, 1998, must meet the requirements of NIST Handbook No. 105-3 or 105-4, as adopted by reference in sections 69-10-03-01.3 and 69-10-03-01.4.~~
- ~~12. A volume standard placed in service before January 1, 1998, that has maintained annual certification need not meet the requirements of NIST Handbook No. 105-3 or 105-4, as adopted by reference in sections 69-10-03-01.3 and 69-10-03-01.4, unless a standard has been removed from service for a period greater than twelve months.~~
- ~~13. Special seals or special tools required for the test or calibration, which is of a unique nature to a particular standard, must be supplied by the standard owner prior to the beginning of the metrology process.~~
- ~~14. If weights greater than one hundred pounds [45.36 kilograms] or provers with capacities greater than fifty gallons [189.27 liters] are shipped to the metrology laboratory, the weights or provers must be shipped on an open flatbed truck or trailer.~~

- ~~15. Standards that are not in compliance with any of the above requirements will not be accepted for testing and certification.~~
- ~~16. A standard that is not tested and certified may not be used to test and certify a commercial device unless a variance permit is obtained from the commission, or unless the standards is recertified. Repealed effective October 1, 2010.~~

History: ~~Effective May 1, 2005; amended effective July 1, 2008.~~

General Authority: ~~NDCC 64-02-03~~

Law Implemented: ~~NDCC 64-02-02~~

69-10-03-08. Rejection of standards. ~~Rejected standards~~ Standards rejected by a NIST-recognized laboratory must be removed from service as follows:

1. A standard that has been rejected must be conspicuously marked by sealing, tagging, or painting as appropriate to that standard.
2. A rejected standard may not be used to test and certify a commercial weighing and measuring device. The use of a rejected standard may result in commission enforcement action.
3. A standard not meeting appropriate design criteria may be allowed to remain in service for a limited time, provided a variance permit is obtained from the commission prior to certification or recertification.

History: Effective May 1, 2005; amended effective July 1, 2008; October 1, 2010.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02

CHAPTER 69-10-04

69-10-04-02. Application for registration and permitting of a service person. Annual application for registration as a registered service person must be submitted to the commission under the following requirements:

1. A first-time applicant shall:
 - a. Provide a written history of education and work experience to show that the applicant is fully qualified to repair, test, and certify a commercial weighing or measuring device; and
 - b. Complete written tests that must be taken ~~in Bismarck, North Dakota~~, at a location and time designated by the commission, and must be administered as follows:
 - (1) The written test will be open book, with seventy-five percent as the minimum passing score. The test material will cover the applicable sections of the adopted 1999 edition of NIST Handbook No. 44, North Dakota Century Code title 64, and North Dakota Administrative Code article 69-10; and
 - (2) In the case of a test failure, an applicant may retake the tests after a review period of ten working days.
2. Each applicant registered by the commission shall utilize adequate standards during the testing and certification of a commercial device.
3. An applicant who is applying for renewal of an existing registration shall complete and submit the application at least fifteen days prior to the expiration date of the applicant's existing registration. Each applicant who has renewed an existing registration shall utilize adequate standards during the testing and certification of a commercial device.

History: Amended effective April 1, 1992; September 1, 1994; July 1, 1997; January 1, 2002; May 1, 2005; July 1, 2008; October 1, 2010.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02

69-10-04-02.3. Issuing a placing in service permit. Upon acceptance and approval of an application, the commission shall issue a placing in service permit to the applicant. All permits issued under this section remain the property of the commission and must be surrendered upon demand. Permits issued will be either probationary or permanent as defined in this section.

1. **Probationary permits.**
 - a. An applicant with less than three months' experience repairing and placing devices into service will receive a probationary permit;

- b. The duration of a probationary permit will be at the discretion of the ~~testing and safety division director~~ commission but will not exceed six months from the date of testing; and
 - c. A probationary permitholder shall be accompanied by, and have each placing in service test report cosigned by, a permanent permitholder from the same service company in order for the test report or the placing in service to be considered valid.
2. **Permanent permits.**
- a. An applicant with more than three months' experience repairing and placing devices into service will receive a permanent permit;
 - b. An applicant who has been previously tested and issued a permanent permit by the commission within the last five years, but has allowed it to expire, will receive a permanent permit; or
 - c. A probationary permitholder who has completed probationary time assigned without receiving any quality control failures will receive a permanent permit.

History: Effective May 1, 2005; amended effective October 1, 2010.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02

69-10-04-06. Quality control - Witnessing Evaluation. The commission may evaluate the work performed by a registered service person to ensure that the person is performing proper inspections and tests. The evaluation method may be by direct observation of a registered service person placing a commercial device into service or by reinspection of a device previously placed into service by a registered service person. The commission ~~shall~~ may consider the following criteria during the evaluation:

- 1. The results of a random sampling of at least one inspection and test per year, or more if so ordered by the commission, of the devices certified by a registered service person;
- 2. Complaints filed against a registered service person, and whether those complaints are valid; and
- 3. Other factors deemed relevant by the commission.

~~The quality control evaluation must be completed within forty-five days of the date the work is completed by the registered service person and at no charge to the owner of the device.~~

History: Effective September 1, 1994; amended effective February 1, 1996; October 1, 1999; July 1, 2008; October 1, 2010.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02, 64-02-13

~~**69-10-04-06.1. Quality control - Failures. Repealed effective October 1, 2010.** Quality control failures must include the outcome of any actual quality control inspections and tests, and any violations of title 64 of the North Dakota Century Code, title 69 of the North Dakota Administrative Code, and any applicable sections of the NIST Handbook No. 44, as adopted by reference in section 69-10-03-01. If a registered service person fails three consecutive quality control inspections within a twelve-month period, the commission may:~~

- ~~1. Issue either a verbal warning or a formal warning letter requiring remedial action within thirty days from the date of the warning;~~
- ~~2. Schedule a conference with the division director or chief inspector, the registered service person, and that person's supervisor;~~
- ~~3. Require that the registered service person retake the written tests required for licensing under section 69-10-04-02;~~
- ~~4. Reduce the registered service person's permit status to probationary for up to six months; and~~
- ~~5. Suspend the registered service person's permit and assess a civil penalty.~~

~~The results of any quality control failures and associated enforcement actions may be sent to the individual permitholder's company or to the owner or operator of the affected device.~~

~~Any quality control failures and associated enforcement actions must be kept on file as part of the overall quality control profile of the registered service person for a twelve-month period from the date of the failure.~~

History: Effective October 1, 1999; amended effective May 1, 2005.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02, 64-02-13

~~**69-10-04-06.2. Procedures for the quality control evaluating work of registered service persons.** A quality control inspection to evaluate the work of a registered service person will be conducted as set forth in this section:~~

1. ~~Quality control inspection selection~~ Selection criteria is as follows includes:
 - a. ~~Established by permitholder number;~~
 - b. ~~Set at one percent, or one of every one hundred placing in services, of average annual production;~~
 - c. ~~Location of the device versus~~ in relation to location of the appropriate state inspector is a controlling factor;
 - b. Each registered service person whose annual device testing total is at least one hundred will be evaluated on one of every one hundred devices tested;
 - d. c. ~~Each permitholder~~ registered service person whose annual production device testing total is less than twenty one hundred will be placed into a special pool of which ten percent will have a quality control performed each year. assigned a quality control level related to the number of total devices tested the previous year; and
 - e. d. ~~Average annual production must be based upon the previous inspection year totals~~ Receipt of a complaint.
2. A permanent permitholder registered service person who receives multiple quality control inspections within a twelve-month period because ~~of the holder has logged a large number of~~ placing in services devices tested, and; has received a "pass" not failed on the first scheduled quality control inspection for that time period, will receive an "honorary pass" on the second scheduled quality control inspection. If the number of ~~placing services~~ devices tested requires a third quality control inspection for which the holder receives a "pass" registered service person does not fail, the fourth scheduled quality control inspection will again be an "honorary pass".
3. ~~The quality control inspection may be based upon the applicable tolerance, acceptance or maintenance tolerance, or design requirements that are applicable to the device.~~
4. ~~The quality control inspection must be completed within forty-five days from the date of the permitholder's test report.~~
5. A specific quality control inspection ends when the tested device either fails a portion of the inspection or it passes the inspection.
6. 4. If When a device fails a quality control inspection, the ~~failed quality control is~~ failure will be documented for that permitholder, the device is will be rejected, and a followup quality control inspection must will be

~~scheduled conducted as soon as practicable on the next device placed into service by the permit holder responsible for the previous quality control failure.~~

- ~~7. At the discretion of the division director, weights and measures inspectors may conduct quality control inspections of self-certifying permit holders either by performing a test on that holder's device or by witnessing the testing of a device by the self-certified permit holder.~~

History: Effective May 1, 2005; amended effective October 1, 2010.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02, 64-02-13

69-10-04-06.3. Quality control - Failures. A quality control evaluation test report that discloses a failure must include any alleged violations of North Dakota Century Code chapter 64-03, North Dakota Administrative Code chapter 69-10-03, and any applicable sections of the NIST Handbook No. 44, as adopted by reference in section 69-10-03-01. If a registered service person fails three consecutive quality control inspections within a twelve-month period, the commission may:

1. Issue a written warning requiring remedial action within thirty days from the date of the warning;
2. Schedule a conference with the registered service person and that person's employer;
3. Require that the registered service person retake the written tests required for licensing under section 69-10-04-02;
4. Reduce the registered service person's permit status to probationary for up to six months; or
5. Suspend the registered service person's permit and assess a civil penalty.

The results of any quality control failures and associated enforcement actions may be sent to the registered service person's employer and to the owner or operator of the affected device.

A quality control evaluation report and a record of any associated enforcement action is filed as part of the overall quality control profile of the affected registered service person and must remain part of that profile for twelve months from the date of the failure.

History: Effective October 1, 2010.

General Authority: NDCC 64-02-03

Law Implemented: NDCC 64-02-02, 64-02-13