

THE ADMINISTRATIVE RULES REVIEW COMMITTEE

2010 Annual Report

I. INTRODUCTION - State Administrative Agencies

The rulemaking process of Iowa Code chapter 17A only applies to executive branch state agencies. Accordingly, agencies housed within either the legislative or judicial branches of state government are not considered in this report.

Iowa Code chapter 7E refers to departments, divisions within departments, independent agencies, and separate constitutional offices; however, there is no overarching structure to Iowa state government. For example, the Department of Commerce has no independent duties other than coordination between its various divisions, which operate independently. Similarly, the Department of Inspections and Appeals is a large regulatory agency; however, it also houses the Racing and Gaming Commission, which is an agency with its own significant regulatory responsibilities and operates largely independently from the Department.

As a practical matter, it is best to define an “agency” as a policy-making body and ignore statutory designations. Using this broad definition there are 125 executive branch administrative agencies: 21 umbrella departments, 46 semi-autonomous divisions, bureaus, and entities within those departments, 27 licensing boards, 26 independent agencies, and 4 separate constitutional offices. The Governor as an individual is excluded from this list because the state’s chief executive is exempt from the rulemaking process; however, any agency housed within that office is subject to the rulemaking process.

II. OVERVIEW OF 2010 RULEMAKING

This report covers the final rulemaking actions in calendar year 2010, published in the Iowa Administrative Bulletin from January through December 2010. The Administrative Rules Review Committee (“Committee”) *generally* reviews rules published the month previous to the Committee’s monthly meeting. Accordingly, this publication period covers the Committee’s February 2010 meeting through its January 2011 meeting.

In 2010, 52 agencies adopted 427 filings. The 2010 filings are detailed by agency and by month in Appendix A. As always, the Department of Human Services leads the list with 88 filings (68 filings in 2009). Twenty-two of these 52 agencies adopted only one or two filings.

Rulemaking filings generally contain more than a single rule change. The 427 filings actually represent over 2,000 individual rule additions, amendments, or repeals. Rulemaking activity for the last 10 years is as follows:

YEAR	AGENCIES	FILINGS	YEAR	AGENCIES	FILINGS
2010	52	427	2005	54	396
2009	56	473	2004	56	420
2008	52	468	2003	54	435
2007	51	446	2002	59	523
2006	58	440	2001	64	419

In 2010, 27 agencies adopted 113 filings using the “emergency” rulemaking provisions of the rulemaking process (Iowa Code §§ 17A.4 and 17A.5). This number is an increase from the 100 emergency filings in 2009. Virtually all of the emergency filings were “double barreled”, i.e., published as a notice of intended action at the same time the notice of emergency rulemaking is published. In 2010, emergency rulemaking filings account for roughly 26 percent of the total filings. The 10-year history for emergency rulemaking is as follows:

YEAR	EMERGENCY	FILINGS	YEAR	EMERGENCY	FILINGS
2010	113 (26 percent)	427	2005	72 (18 percent)	394
2009	100 (21 percent)	473	2004	59 (14 percent)	420
2008	98 (21 percent)	468	2003	73 (17 percent)	435
2007	93 (21 percent)	446	2002	64 (13 percent)	523
2006	65 (14 percent)	440	2001	57 (14 percent)	419

To calculate the volume of rulemaking, only *filed* documents are counted, either through the normal process or through emergency rulemaking. Individual rule changes contained within each document are not counted. If notices were included, the volume of rulemaking would virtually double. Each filing put into effect contains one or more individual rule changes; on the average each filing contains approximately four individual changes. The 2010 rulemaking filings are broken down by month on the top line of the following chart, which tracks the previous ten years:

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	TOTAL
2010	30	35	34	42	40	44	23	35	39	22	41	42	427
2009	32	32	27	31	33	36	85	28	46	36	38	49	473
2008	51	20	10	30	17	26	98	31	34	40	49	62	468
2007	36	33	14	26	25	30	38	80	26	62	32	44	446
2006	26	54	41	27	39	32	51	39	11	59	35	26	440
2005	23	39	15	09	23	33	80	32	24	19	54	45	396
2004	28	32	39	28	27	34	41	20	67	33	43	28	420
2003	20	41	39	23	31	25	38	44	35	48	38	53	435
2002	39	52	43	45	56	33	32	52	57	49	35	30	523
2001	34	44	23	31	43	19	36	23	34	60	21	51	419
2000	19	29	22	28	22	34	23	38	34	56	45	17	367
1999	14	51	29	26	111	45	35	29	44	33	28	61	506

III. COMMITTEE ACTIONS

The number of formal actions taken by the Committee has remained at a steady level. The two objections imposed in 2010 are at a level similar to each of the previous five years. One session delay was imposed and six 70-day delays were imposed. The Committee also approved five general referrals and two requests for a regulatory analysis. These actions are summarized below in the next section.

IV. SUMMARY OF 2010 RULES REVIEW COMMITTEE ACTIONS

February 2010 through January 2011 ARRC Meetings

JANUARY-2011

DECEMBER-2010

NOVEMBER-2010

- ENVIRONMENTAL PROTECTION COMMISSION, *Air Quality*, ARC 9154B, Adopted. 70-day delay approved on Items 4, 5, 6, and 7 of the rulemaking.
- EDUCATION DEPARTMENT- *Supplementary weighting*, ARC 9143B, Adopted. General Referral.

OCTOBER-2010

- NATURAL RESOURCES DEPARTMENT, *Interstate Sale of Nursery Material*, ARC 9051B, Adopted. 30-day delay, additional review.

SEPTEMBER-2010

- PHARMACY BOARD- *Pharmacy technicians*, ARC 9009B, Adopted. Objection.
- PHARMACY BOARD- *Imitation controlled substances*, ARC 9000B, Adopted, General Referral.
- EPC- *Greenhouse gas emissions*, ARC 8999B, Notice . Informal regulatory analysis.
- PUBLIC SAFETY DEPARTMENT- *Licensing of fire protection system installers and maintenance workers*, ARC 9032B, 70 day delay. General Referral

AUGUST-2010

JULY-2010

- ENVIRONMENTAL PROTECTION COMMISSION - *Air Quality Rules*, 8845B, NOTICE. Informal Regulatory analysis.

JUNE-2010

- DNR- *Permit fees*, ARC 8815B, Adopted. 70 day delay.

MAY-2010

APRIL-2010

- REVENUE DEPARTMENT- *Valuation of property in mixed-use and transitional neighborhoods*, ARC 8559B, Adopted. General Referral
- ENVIRONMENTAL PROTECTION COMMISSION- *Leak detection*, ARC 8469B. 135.5(1), Adopted. Session delay
- EDUCATION DEPARTMENT- *Nutritional content standards for beverages*, ARC 7782B, Adopted, General Referral. ARC 8469B.

MARCH-2010

- PROFESSIONAL LICENSURE DIVISION- *Requiring cosmetology schools to always have two instructors present*, ARC 8515B, Adopted. 70 day delay.

FEBRUARY 2010

- ENVIRONMENTAL PROTECTION COMMISSION-*Requiring monitors for unstaffed fuel facilities*, ARC 8469B, Adopted. 70 day delay. Objection.

V. MAJOR ITEMS BEFORE THE COMMITTEE

EDUCATION DEPARTMENT, *Nutritional content standards for snack foods and beverages*, 5/20/09 IAB, ARC 7782B.

2008 Iowa Acts, Senate File 2425, division XI, created the “Healthy Kids Act.” The Department issued new rules to implement the Act. The rules at issue here set nutritional standards for foods and beverages sold on school grounds during the school day. The rules generally apply to food and beverages served a la carte or through vending machines. The rules do not apply to food and beverages served through a school breakfast or school lunch program, sold for fund-raising purposes or at concession stands, or provided by parents or school staff.

The rules set limits on calories, sodium, fat, and sugar contained in individual items, and require half of grains offered to be whole grain. Certain foods such as fruit, yogurt, and nuts are excluded from these standards. Additionally, the rules prohibit sports drinks, flavored waters, and caffeinated beverages in elementary schools, and prohibit sodas and other carbonated beverages in all schools.

The Committee previously reviewed these rules in their meeting in June 2009. At that meeting, the Committee referred the rules to the General Assembly. The legislature took no action at that time.

Department officials stated the rules are intended to only prohibit foods containing only non-nutritive calories, and will be revised over time. The Iowa Dietetic Association testified the rules should go farther, and advocated full adoption of the standards recommended by the Nutrition Advisory Panel. The Iowa Beverage Association testified about voluntary steps the industry has taken to improve nutrition in its products, and advocated full adoption of the standards developed by the industry.

Action. General referral. The legislature took no action.

ENVIRONMENTAL PROTECTION COMMISSION, *Leak detection requirements for unstaffed fueling facilities*, 01/13/10 IAB, Adopted, ARC 8469B.

Background. This adopted filing establishes leak detection requirements for unstaffed fueling facilities. It requires in-line leak detection to shut off the pump and stop fuel flow to the dispenser.

Commentary. Discussion at the February 8, 2010 meeting raised several issues. The first issue is the lack of consensus on the number of facilities impacted by this requirement. The second issue is the cost of installing the required upgrades. EPC representatives estimated a rough cost of \$1450 per line, while industry representatives contended that actual costs would be much higher, with upgrades requiring partial excavation of the tank. The last issue is the need for these upgrades. EPC representatives stated there have been 80 releases in two years, but there was no information to determine how many of these releases were at unstaffed facilities.

The Committee members felt the new detection requirements were unreasonable because of the uncertain economic impact they will have and the lack of evidence that

unstaffed dispensing facilities pose a significant problem that justifies the cost of new equipment.

Action. The Committee objected to the provisions of ARC 8469B on the grounds that they are unreasonable. The committee also imposed a 70-day delay and in April a session delay.

HUMAN SERVICES DEPARTMENT, *Care facilities: pay for performance*, 01/13/10, ARC 8445B.

House File 811, §33 required the Department to devise a system to recognize and reward care facilities that provide cost-effective quality of life and appropriate access to medical assistance program recipients. The Act requires performance benchmarks and a system to collect data to evaluate nursing facility performance and to adjust the program and to recognize improvement. The program includes procedures to provide a pay-for-performance payment based upon a nursing facility's achievement of multiple favorable outcomes as determined by these benchmarks. Under the Act, any increased reimbursement shall not exceed five percent of the direct and nondirect care medians. A facility may not receive a payment in a period where it has been cited for a deficiency resulting in actual harm or immediate jeopardy. Reimbursements may be reduced for certain other deficiencies.

The Act also specifically provides that pay-for-performance payments be used to support direct care staff through increased wages, enhanced benefits, and expanded training opportunities and that all pay-for-performance payments be used in a manner that improves and enhances quality of care for residents.

The new rules establish benchmarks in four "domains": quality of life, quality of care, access, and efficiency. Possible scores in each domain are: quality of life, 25 points; quality of care, 59 points; access, 8 points; and efficiency, 8 points, for a potential total of 100 points. The entire list is detailed in chart form. A facility must receive at least 51 points to qualify for any additional reimbursement. Add-on payments are graduated depending on the facility's performance score as follows:

- A score of 51-60 points qualifies for an add-on of 1 percent of the direct care plus nondirect care cost component patient-day-weighted medians.
- A score of 61-70 points qualifies for an add-on of 2 percent of the direct care plus nondirect care cost component patient-day-weighted medians.
- A score of 71-80 points qualifies for an add-on of 3 percent of the direct care plus nondirect care cost component patient-day-weighted medians.
- A score of 81-90 points qualifies for an add-on of 4 percent of the direct care plus nondirect care cost component patient-day-weighted medians.
- A score of 91-100 points qualifies for an add-on of 5 percent of the direct care plus nondirect care cost component patient-day-weighted medians.

BOARD OF MEDICINE, *Policy on chronic intervention pain management*, 6/30/2010 IAB, ARC 8918B, ADOPTED.

Background. This filing was reviewed by the Committee in April. The Board has developed this policy over a number of years, and after an earlier meeting with the

Administrative Rules Review Committee, the Board determined that the policy should be adopted through the rulemaking process.

Commentary. This rulemaking sets out standards of practice for the practice of interventional chronic pain management; the rules set out in detail the techniques used in pain management and provides examples of those techniques in use. The rules also describe the process of pain management: comprehensive patient assessment, pain diagnosis, evaluation and selection of treatment options, termination of treatment when appropriate, follow-up care, and collaboration with other health care providers.

The rules also provide that “[i]nterventional chronic pain management is the practice of medicine.” This phrase is the controversial portion of the rule. Board representatives state that the rule does not impact licensed practitioners operating within the scope of their own profession; the representatives cited Iowa Code §148.2, which excludes from the practice of medicine:

“4. Licensed podiatric physicians, chiropractors, physical therapists, nurses, dentists, optometrists, and pharmacists who are exclusively engaged in the practice of their respective professions.”

Proponents also state that chronic pain management requires a great level of training and skill and that it would not be provided at every local hospital. Opponents contend that the phrase could be interpreted to mean that interventional chronic pain management was exclusive to the practice of medicine.

Following discussion, a motion was made to object to the rule. Staff requested an opportunity to prepare and distribute a draft copy of an objection. That draft was considered later in the meeting. The objection failed on a five in favor to four opposed vote (an objection requires six votes). Discussion ensued and the vote was called into question over whether an absent member was denied a fair opportunity to vote by telephone.

Action. No further action taken.

NATURAL RESOURCES DEPARTMENT, *Special event fee*, 6/2/10 IAB, Filed, ARC 8815B. 70-Day Delay

Background. These provisions create a general set of rules applying to boating, ATV, and snow events, such as an organized race, tournament, exhibition, or demonstration. The fee for each event is 25 dollars. This filing was reviewed at the Committee’s June meeting and a 70-day delay was imposed.

Commentary. The fee was opposed by various boating organizations around the state who contended that events were held virtually every week, and thus that the fees could run up to hundreds of dollars for each club. Discussions were ongoing since the June meeting, but a complete resolution of all issues had not yet been reached. For this reason, the NRC rescinded this entire rulemaking on an emergency basis and will adopt new rules after the issues have been resolved.

Action. Rules terminated. The Department will develop a revised set of rules.

PHARMACY BOARD, *Artificial Marijuana*, 8/11/10 IAB, ARC 9009B, FILED EMERGENCY.

Lawmakers have been concerned about the rise in use of synthetic cannabinoids. These synthetic cannabinoids produce an intoxication similar to marijuana, but are much more potent. These synthetic cannabinoids were generally available in products marketed as incense under names including K2, Spice, and Red Dragon Smoke. At least

one Iowan has died after using a synthetic cannabinoid, and no test to detect these cannabinoids currently exists.

In response, the Pharmacy Board issued two new rules amending Chapter 10, "Controlled Substances," of the Iowa Administrative Code. New rule 10.38 temporarily designates these synthetic cannabinoids as controlled substances, which places the substances into Schedule I of the Iowa Uniform Controlled Substances Act. This first rule is temporary to give the legislature time to consider adding the synthetic substances to the statutory list of controlled substances. New rule 10.41, which is permanent but carries lighter penalties than the first rule, designates these synthetic cannabinoids as imitation controlled substances.

The Committee supported 10.41, noting the Pharmacy Board clearly has the authority to declare an imitation controlled substance. The Committee vigorously debated 10.38, questioning the penalties for the sale and possession of these substances, the best way to enforce 10.38, and the shape of future legislation. The Committee decided these issues are best addressed by the entire legislature.

Action. General referral. Synthetic cannabinoids were designated as controlled substances by statute during the 2011 session.

REVENUE DEPARTMENT, Responsibility of assessor, 3/10/10 IAB, ARC 8559B, FILED.

Background. This rulemaking amends the Department's rules relating to property taxation. The rules as published under notice required the local assessor to classify property, but not value property, according to its present use and not its highest and best use and provided that a property's value shall not be based on speculative highest and best use not supported by current comparable sales. The original rulemaking resulted from a court ruling that found the Department's rules to be noncompliant with statute. When the proposed rules were first reviewed by the Committee, several interested parties expressed concern about the use of the term "speculative" and about potential conflicts with the guidelines and publications of certain industry organizations.

The rules adopted by the Department only retain Item 1 from the original rules published under notice. Item 1 removes any reference regarding the valuation of real estate from subrule 71.1(1), which is intended to govern the classification of real estate.

Item 2 published under Notice, an amendment to subrule 71.1(2), was unable to be agreed upon by the interested parties and was not adopted. This amendment was to become effective April 14, 2010.

Commentary. Committee members questioned the Department about the inability to reach a consensus on Item 2 that was not adopted by the Department. Representatives from the Department and other interested parties expressed the differing views and the potential problems that result from the use of "speculative" sales, particularly in areas described as transitional neighborhoods, where a mix of property classifications may exist or where the use of property in the area is changing. The court ruling that prompted this rulemaking invalidated only the rules pertaining to valuation. Discussion between Committee members and other interested parties included discussion about whether legislative action would ultimately be required to resolve the valuation issue. A motion to refer the issue to the General Assembly was approved.

Action. Referred to General Assembly.

APPENDIX A—SUMMARY OF RULEMAKING IN 2010

Agency	Jan 13	Jan 27	Feb 10	Feb 24	Mar 10	Mar 24	Apr 7	Apr 21	May 5	May 19	June 2	June 16	June 30	July 14	July 28	Aug 11	Aug 25	Sept 8	Sept 22	Oct 6	Oct 20	Nov 3	Nov 17	Dec 1	Dec 15	Dec 29	Tot
Human Services Department [441]	12		5		5		10		7		2	2	10			5		5	2	6		6		4		7	88
Public Health Department [641]	1		3	7			8				11	1				4		1		1				5			42
Iowa Finance Authority [265]	4		1	4		1			4		1		4		4		2	1			2				5		33
Educational Examiners Board [282]					6		1				1				3			7				9					27
Natural Resource Commission [571]	2				1						4		9			2		5		1		3					27
Civil Rights Commission [161]									18																		18
Environmental Protection Commission [567]	3		3		1		2					2				1	1				1		2				16
Pharmacy Board [657]				2			5						3			3			1		1	1					16
Economic Development, Iowa Department of [261]	2				1							3	2					5							1		14
Labor Services Division [875]			1		2	1				2	1		1			2			1				3				14
Public Safety Department [661]	1			1				1		1				3	1		1						3		1		13
Education Department [281]							3				2														7		12
Insurance Division [191]						1								1			1				3	3	3				12
Professional Licensure Division [645]			1		3	2							1							1		2	1				11
Revenue Department [701]				2	5			1											2							1	11
Agriculture and Land Stewardship Department [21]							1	2				1			1		1		1		1	1	1				10
Ethics and Campaign Disclosure Board, Iowa [351]	1										4						4					1					10
Inspections and Appeals Department [481]							1	1				2												3		1	8
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