



IOWA GENERAL ASSEMBLY

Administrative Rules Review Committee

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THE RULES DIGEST

November 2009

Scheduled for committee review Tuesday, November 10th, 2009. Senate Committee Room #24

Reference XXXII IAB No. 08(10/07/09) XXXII IAB No. 09(10/21/09)

HIGHLIGHTS IN THIS ISSUE:

REGULATORY ANALYSIS: HIGH QUALITY WATER, EPC.....1
VETERINARY ASSISTANTS, Veterinary Medicine Board.....4
HEALTH CARE FACILITIES: SENATE FILE 433 REVISIONS, Inspections and Appeals.....5
BOARDING HOMES, Inspections and Appeals.....6
CARE FACILITIES: PAY FOR PERFORMANCE, Human Services Department8

ENVIRONMENTAL PROTECTION COMMISSION

9:05

Regulatory analysis: high quality water, IAB Vol. XXXII, No. 09.

At its September 2009 meeting the committee requested a formal regulatory analysis concerning ARC 8038B, relating to the anti-water degradation implementation procedure contained in that proposal. That notice of intended action was published in 08/12/09 issue of the Iowa Administrative Bulletin and relates to the designation of "outstanding Iowa waters". The committee was concerned about the impact these restrictions would have on the growth and economies of neighboring rural communities. In essence, the request for a regulatory analysis postpones the final adoption of the rulemaking until the analysis is completed.

This rulemaking was initially noticed in November, 2008. Following that initial rulemaking the proposal was redrafted and a new notice has been published. Iowa's antidegradation policy is intended to protect existing uses of surface waters (e.g.: fishing, boating, etc.) and to specify how the EPC will determine whether and to what extent existing water quality may be lowered in a surface water. This policy is required by federal law; under federal regulation water quality may be lowered only as "necessary to accommodate important economic or social development in the area."

THE RULES DIGEST

-2-

The regulatory analysis states that federal law requires that the Outstanding National Resource Waters category (Tier 3) must be included in any state's antidegradation policy and implementation procedures. The analysis states that inclusion of a stream in the Outstanding Iowa Waters (OIW) antidegradation category could have an economic impact in a given watershed; this category now contains 32 streams and six lakes. This category provides a very high level of water quality protection by prohibiting degradation of Outstanding Iowa Waters except in three situations:

- The degradation will be "temporary and limited";
- less degrading alternatives are not available;
- The degradation is caused by the expansion of an existing source and the applicant has selected the least degrading alternative that is "affordable"

Inclusion in the OIW category would impact new enterprises which require discharging on-site wastewater disposal systems, such systems would be prohibited in an OIW. The analysis notes that antidegradation policies only apply to certain regulated concentrated animal feeding operations (CAFOs), and does not include most confinement feeding operations because they are specifically prohibited from discharging by state law. Discharges are prohibited from regulated CAFOs that are considered to result in degradation in the drainage areas of Outstanding Iowa Waters.

The analysis does anticipate fee increases for certain for individual NPDES permits in order to provide the additional review needed to ensure that the degradation of Outstanding Iowa Waters resulting from these regulated activities will be "temporary and limited" as required by the exemption.

EDUCATION DEPARTMENT

9:40

Financial management of categorical funding, IAB XXXII No. 05, ARC 8054B, rules 98.12 and 98.112, 70 day delay.

This filing was delayed by the committee at its September meeting. These rules provide information concerning the financial management of funding for school districts and area education agencies. At the committees' September meeting, persons associated with home school assistance programs requested that home school assistance programs be treated as a public school program for funding purposes, similar to the statewide voluntary four-year-old preschool program. They contended that treating the home school program like supplemental funding means that many expenses that will not be reimbursed, which will eventually lead to services being limited or cut altogether.

THE RULES DIGEST

-3-

Department representatives contended that the change assists home school assistance programs because identified certain school districts were using home school assistance funding for non-home school related expenditures and the new rules would halt this practice.

* * *

No Rep.

Senior year plus, IAB XXXII No. 08, ARC 8187B, ADOPTED.

These provisions were initially reviewed by the Committee in April 2009. Iowa Code chapter 261E created the “Senior Year Plus Program.” This program provides high school students more access to advanced placement coursework and postsecondary credit. Programs include postsecondary enrollment, concurrent enrollment in community college courses for both secondary and postsecondary credit, career academies, and courses delivered via the ICN or the internet. Admission to an advanced placement program is by examination, with prerequisite coursework for each advanced placement course. Courses are taught by licensed teachers who meet the minimum certification requirements of the national organization that administers the advanced placement program.

The concurrent enrollment program allows high school students to enroll part-time in eligible courses at or through community colleges, if comparable courses are not offered by the high school.

A high school shall annually approve courses to be made available for high school credit using locally developed criteria to ensure academic rigor and preparation of the student to a postsecondary institution.

The postsecondary enrollment option program allows high school students to obtain credit for courses taken at postsecondary institutions. Eligible courses are limited to:

- Nonsectarian courses.
- Courses that are not offered by the school district.
- Credit-bearing courses that lead to an educational degree.
- Courses in mathematics, science, social sciences, humanities, and vocational-technical education.
- Courses in career option programs offered by area schools.

A school district must pay tuition to a postsecondary institution that has enrolled its resident eligible students. The amount of tuition reimbursement for each separate course is the lesser of the actual and customary costs of tuition, textbooks, materials, and fees or \$250. A student is not eligible to enroll on a full-time basis in an eligible postsecondary institution.

THE RULES DIGEST

-4-

A regional academy is a program established by a school district to which multiple school districts send high school students. An academy shall offer advanced level courses and may include in its curriculum career and technical courses.

EDUCATIONAL EXAMINERS BOARD

10:00

Complaints, investigations, contested case hearings, IAB Vol. XXXII, No. 06, ARC 8143B, NOTICE.

This notice of intended action has been re-scheduled from the October meeting; it revises the manner and timing by which a respondent receives a copy of a complaint at the beginning stage of an investigation. Current rules relating to the investigation of a complaint require the respondent to receive a copy of the complaint at the beginning stage of the investigation. The proposed amendment would eliminate the requirement for notice at the beginning of the investigation and instead require a copy only after the board has found probable cause. The proposed rules also specify that the complaint notice must include the respondent's name, address, and telephone number, if known, a concise statement of the facts of the alleged violation, an explanation of the facts underlying the complaint, and a citation to the specific rule or law alleged to have been violated. The proposed rules also strike provisions relating to the means by which the respondent receives the notice and instead requires only that the notice be in writing.

VETERINARY MEDICINE BOARD

10:20

Auxiliary personnel, IAB Vol. XXXII, No. 07, ARC 8168B, NOTICE.

This proposal has been held over from October. Iowa Code section 169.20 provides that a veterinarian may employ "certified" assistants for any purpose other than diagnosis, prescription, or surgery. The assistants must act under the direct supervision of a licensed veterinarian. Under this section, a certification is not a license and does not expire. The proposed rules provide that certificates are for a three year period.

In part, the proposed rules provide for additional classifications of employees who are employed by veterinarians, and include additional education, testing, and continuing education requirements for non-veterinarian personnel. Code section 169.20 specifically provides for "certified" assistants; the term "registered" is created by rule. The rules also define, for each class of personnel, the level of supervision by a licensed veterinarian that is required for assisting the veterinarian in the treatment of animals and for performing laboratory work in a veterinary practice.

The current rules simply provide for "veterinary technicians" and required them to pass a Board examination. The proposed rules establish three levels of technicians:

THE RULES DIGEST

-5-

- Certified veterinary assistant (CVA) is an individual who has passed examinations prescribed by the board.
- Non-credentialed veterinary assistant (NCVA) is an individual who is not a registered veterinary technician or certified veterinary assistant or a veterinary assistant.
- Registered veterinary technician (RVT) is an individual who is a graduate of an accredited school of veterinary technology or is currently registered in the State of Iowa as a veterinary technician and who has successfully passed examinations prescribed by the Board.

The crux of this proposal is rule 8.5, relating to supervision. The rule contains a chart and details the level of veterinarian supervision required for each type of assistant, based on the procedure being performed. A number of procedures may not be performed by non-credentialed assistants. The proposal sets out three levels of supervision; these levels are consistent with other professions:

- Immediate supervision means that a licensed veterinarian is on the premises and within eyesight or hearing range.
- Direct supervision means that a licensed veterinarian is on the premises and is readily available.
- Indirect supervision means that a licensed veterinarian is not necessarily on the premises but is able to perform the duties of a licensed veterinarian by maintaining direct communication.

INSPECTIONS AND APPEALS

10:45

Health care facilities: exit interviews, IAB Vol. XXXII, No. 08 ARC 8190B, NOTICE.

2009 Iowa Acts, Senate File 433, enacted several provisions relating to the inspection and citation of health care facilities and assisted living programs. Topics include conflict of interest restrictions for inspectors and monitors, training requirements for inspectors and monitors, and procedures and penalties for violations. Many of the new rules simply reflect the statutory changes.

The Department proposes additional rules for timeframes and procedures for inspections and the citation of deficiencies. The proposal commits the Department to inspecting each facility at least once within a 30-month period. Medicare or Medicaid facilities may be inspected more frequently. The rule sets out a timeframe for investigating complaints or self-identified incidents:

- Two working days for immediate jeopardy deficiencies where there is a likely risk of serious injury, harm, impairment, or death to a resident.
- Ten days for nursing facilities and 20 working days for intermediate care facilities and residential care facilities for non-immediate jeopardy deficiencies where the impact may have caused harm that negatively impacts the resident's mental, physical, or psychosocial status.
- Forty-five calendar days in other situations where the deficiency may cause harm of limited consequence and does not significantly impair the individual's mental, physical, or psychosocial status or function.

The proposal also details a process for correcting deficiencies and re-inspections. Within 10 working days, the facility must submit a plan of correction detailing how the facility will correct the deficient practice; how the facility will protect residents in the

THE RULES DIGEST

-6-

future; what measures the facility will take to ensure that the problem does not recur; how the facility plans to monitor its performance; and a time frame for completion of the correction.

The specific standard for determining a regulatory deficiency under the proposed rules is "preponderance of the evidence." This means that after evaluating all the evidence, the allegations or deficiency is more likely true than not true. The standard does not require that the inspector personally witnessed the alleged violation.

The Act contains new provisions relating to the self-identification of deficiencies by a facility. If no complaint has been filed and the facility corrects that deficiency, no penalty will be imposed in most situations. The rules set out a process to document the self-identification and the correction.

The existing statute contains provisions for a discretionary waiver of a fine for certain class II violations if the violation is corrected within the time specified in the citation. The Department now proposes criteria for those waivers and a procedure for making the request. The rules set out three criteria:

- The past history of the facility within the last 24 months of the violation as it relates to the nature of the violation;
- the rights of residents to make informed decisions with their doctor and family or legal representative; and
- the financial hardship the fine will cause the facility.

The process provides that the decision to deny a waiver request is not subject to appeal. The underlying citation or statement of deficiencies is eligible for appeal.

New training requirements provide that all nursing facility inspectors shall receive 12 hours of annual continuing education in gerontology, wound care, dementia, falls, or a combination of these subjects. Inspectors are not personally liable for financing the training required.

* * *

No Rep

Boarding homes, IAB Vol. XXXII, No. 09, ARC 8243B, FILED.

This rulemaking implements 2009 Iowa Acts, Senate File 484, which establishes regulatory requirements involving boarding homes and dependent adults. The Act requires annual registration of boarding homes, establishes regulatory requirements for boarding homes and dependent adults, and mandates improved record keeping of abuse allegations. Failure to register carries a civil penalty of not more than five hundred dollars. Under the Act, a boarding home is a facility that rents rooms to three or more unrelated persons and provides supervision or assistance with activities of daily living to

THE RULES DIGEST

-7-

those persons. The term does not include a facility that is otherwise licensed by the state.

The proposed rules require each boarding home to file a statement of registration with the Department. The statement of registration must contain certain information, including the names of the owner, lessee, and manager, the number of rooms available, the maximum number of tenants for the home, location of the home, and occupant loads. Each boarding home is also required to file an annual occupancy report that includes information relating to the number of rooms and tenants, the number of tenants receiving certain types of public assistance, types of services provided by the owner, lessee, or manager, and certain fire inspection information.

The proposed rules establish the procedures and requirements for complaints regarding the operation of a boarding home. Those proposed rules include the content of complaint reports, timeframes for investigations, the role of the core multidisciplinary agencies, standards for determining whether a complaint is substantiated, and the criteria to consider when deciding whether to impose a penalty.

The Department held a public hearing on September 18, 2009 that included nine ICN sites, and no comments were presented. The Department received written comments from one industry group relating to the online availability of information on registered boarding homes. The Department will provide a searchable database for such information. In response to comments from its Food and Consumer Safety Bureau, the Department will also include a question on the registration form which asks whether a production kitchen is being used to prepare meals. A cross reference has also been added to rule 66.3 referring readers to the definition of "known" rule 66.1.

These rules will become effective January 1, 2010.

ECONOMIC DEVELOPMENT DEPARTMENT

11:00

Iowa Broadband Deployment Governance Board, IAB Vol. XXXII, No. 08 ARC 8132B, EMERGENCY.

2009 Iowa Acts, Senate File 376, mandated that the Department, along with the Utilities Board and the telecommunications and technology commission establish and administer an "Iowa broadband deployment governance board" (IBDGB). The IBDGB is to establish a comprehensive broadband deployment program and a competitive process for granting funds to deploy and sustain high-speed broadband services. The 15-member IBDGB consists of educational users, local governments, urban and rural

THE RULES DIGEST

-8-

residential users, broadband and telecommunications providers, state government, and four legislators, serving as non-voting members.

The broadband deployment program will promote universal access to sustainable high-speed broadband services throughout the state, and will award state grant funds as matching funds for the available federal funds. The program is open to both government and private entities. The program will fund capital projects that can be completed in 24 months. To be eligible a project must make broadband connections available to all business, government, educational, and residential locations within the project area. Projects will be evaluated using weighted criteria:

- Project purpose. (0-25 points).
- Project benefits. (0-25 points).
- Project viability. (0-25 points).
- Project budget and sustainability. (0-25 points).

* * *

Community attraction and tourism development programs, IAB Vol. XXXII, No. 08, ARC 8213B, ADOPTED.

These provisions were initially reviewed by the Committee in September, as an emergency filing. The Department now completes a "regular" rulemaking. These rules implement 2009 Iowa Acts, House File 822 and Senate File 336, relating to the Vision Iowa Board committees that review applications and the authorization of a waiver of the local or private matching requirement "if the applicant is located in an area declared a disaster area by the governor or by a federal official."

The rules specify the composition of the Vision Iowa program review committee and define the circumstances under which an applicant may request a waiver. The Department's rules allow the board to provide the waiver for good cause shown. The rules state that good cause "includes but is not limited to" documentation that the area of the proposed project is within a disaster area.

HUMAN SERVICES DEPARTMENT

11:15.

Care Facilities: pay for performance, IAB XXXII No. 09, ARC 8246B, NOTICE.

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

THE RULES DIGEST

-9-

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 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.

BANKING DIVISION

No Rep

Mortgage loan originators, IAB Vol. XXXII, No. 09 ARC 238B, ADOPTED.

The 2009 Iowa Acts, Senate File 355, the Iowa Secure and Fair Enforcement for Mortgage Licensing Act (SAFE), requires individuals who take residential mortgage loan applications or offer or negotiate terms of *residential* mortgage loans, to be licensed by the division. Failure to obtain the license is a class "D" felony. These individuals are referred to as "mortgage loan originators". The requirements do not apply to attorneys acting on behalf of a client or private transactions.

Applicants for licensure must complete a background check, pass a national-level test, and complete twenty hours of prelicensing education which includes: three hours of federal laws and regulations pertaining to residential mortgage loan origination, three hours of ethics, and two hours of training related to lending standards for the

THE RULES DIGEST

-10-

nontraditional mortgage product marketplace. The required education may be obtained in a classroom, online, or by any other means approved by the nationwide mortgage licensing system and registry.

All licenses expire on the next December 31 after issuance; however, licenses issued on or after November 1 but before January 1 will not expire until December 31 of the following year. Licensees must annually obtain eight hours of continuing education and maintain a surety bond based on the dollar amount of loans originated, processed, or underwritten on an annual basis.

BOARD OF MEDICINE

No Rep.

Standards of practice—medical directors at medical spas, IAB Vol. XXXII, No. 08 ARC 8199B, NOTICE

The Board proposes practice standards specific to a physician serving as the medical director at a facility offering medical aesthetic services. Such a facility is referred to as a spa and offers a variety of medical-type skin treatments, but does not include a dermatology practice.

The supervising physician may delegate the provision of a service only if that service is:

- Within the delegating physicians' scope of practice and medical competence;
- a service that a reasonable and prudent physician would conclude is within the scope of sound medical judgment to delegate; and
- a routine and technical service which does not require the skill of a physician.

The supervising physician must ensure that the person providing the actual service is qualified to perform that service and that direct supervision is provided regularly. The supervising physician must be located within a "reasonable distance from the service site and be available, in person or electronically, to consult with the service provider. The service provider must maintain medical records for each service performed, including a patient consent.

TRANSPORTATION DEPARTMENT

No Rep.

Close clearance: railroad signage, IAB XXXII No. 08, ARC 8202B, ADOPTED.

This filing was initially reviewed by the Committee at its July 2009 meeting. Iowa Code section 327F.13 provides that: "[t]he owner of a railroad track shall place a warning device at a location where the close clearance between the track and a building, machinery, trees, brush, or other object is such that the building, machinery, trees, brush, or other object physically impedes a person who is lawfully riding the side of a

THE RULES DIGEST

-11-

train in the course of the person's duties in service to a railroad company from clearing the building, machinery, trees, brush, or other object."

The Department published a notice of intended action in July 2008. The proposal defined the term "close clearance" and set out placement and dimension requirements for the required warning device. A representative of the United Transportation Union stated this was the weakest regulation in the nation and urged the adoption of a more comprehensive national code to ensure proper worker safety. Department representatives responded that the statute provided authority to regulate only the size and placement of these signs and that the statute did not provide any authority to adopt a broader safety code. At its September 2008 meeting, Committee members requested that the Department meet with stakeholders and resolve this issue. Subsequent discussions have not resolved these differences, and the six-month window for adopting the proposal has passed.

The proposed follows the statutory language and sets out specific requirements for the size and placement of the warning signs and does not contain a safety code.