

**MINUTES OF THE MAY 2011 MEETING
OF THE
ADMINISTRATIVE RULES REVIEW COMMITTEE**

- Date of meeting: The regular, statutory meeting of the Administrative Rules Review Committee (ARRC) was held on Wednesday, May 11, 2011, in Room 116, State Capitol, Des Moines, Iowa.
- Members present: Representative Dawn Pettengill, Chair, and Senator Wally Horn, Vice Chair; Senators Merlin Bartz, Thomas Courtney, and John P. Kibbie; Representatives David Heaton, Rick Olson, Jo Oldson, and Linda Upmeyer were present. Senator James Seymour was not present.
- Also present: Joseph A. Royce and Jack Ewing, Legal Counsel; Stephanie A. Hoff, Administrative Code Editor; Brenna Findley, Administrative Rules Coordinator; fiscal staff; caucus staff; and other interested parties.
- Convened Rep. Pettengill convened the meeting at 8:40 a.m.
- Motion Sen. Kibbie moved that Sen. Horn be elected chair of the committee and that Rep. Pettengill be elected vice chair of the committee.
- Motion carried Sen. Horn and Rep. Pettengill were elected chair and vice chair, respectively.
- Fiscal overview** Sue Lerdal presented the LSA fiscal report.

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT Steve Moline represented the department. Other interested parties included Kathy Collins of Iowa Friends of Companion Animals.

- ARC 9456B Amendments to 67.8 update provisions related to the department’s ability to regulate federal animal facilities. Sen. Kibbie expressed concern regarding the emergency filing. In response, Mr. Moline stated that the amendments will soon be published under notice of intended action to solicit public comment. Rep. Upmeyer clarified that the emergency amendments remain in place. In response to a request from Sen. Kibbie, Mr. Moline agreed to provide information regarding the number of state-licensed kennels and federally licensed kennels with state permits that are supervised under the statute and the FTEs associated with the kennels.
Ms. Collins stated that a provision of 2010 Iowa Acts, Senate File 2280, granted the department authority to investigate federally licensed commercial breeding facilities when complaints regarding those facilities are received by the department. Ms. Collins stated that policy regarding filing a complaint, including the standard by which the department will investigate a complaint, should be set forth in rule.

ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF Thom Guzman and Matt Rasmussen represented the department.

- ARC 9455B No action on amendments to ch 39 pertaining to the Iowa main street program.
- ARC 9485B Ch 77 concerns a site development program to establish an inventory of sites in Iowa that may be suitable for development or redevelopment and to provide consultation to local governments about site development techniques. Discussion pertained to site size.

IOWA FINANCE AUTHORITY Mark Thompson represented the authority.

- ARC 9454B No action on the rescission of ch 14, homeless shelter assistance program. This chapter has been superseded by recently adopted ch 41.
- ARC 9457B The proposed amendment to 32.7 pertains to the calculation of jobs created. Sen. Kibbie expressed concern about and requested reconsideration of the exclusion of temporary positions from the jobs-reporting requirements. Rep. Upmeyer expressed caution about the counting of temporary workers multiple times in the jobs reports but noted the need for an accurate count of jobs. Mr. Thompson agreed to relay these concerns to the authority.
- ARC 9499B No action on the rescission of ch 25, entrepreneurs with disabilities program. The rules regarding this program have been adopted by the Iowa vocational rehabilitation services division of the department of education and are set forth in ch 56, division X.

EDUCATION DEPARTMENT Carol Greta represented the department.

- ARC 9475B No action on amendments to ch 36 regarding extracurricular athletic competition.
- ARC 9477B No action on the amendment to 36.14(1) that removes the religious beliefs-based exemption to the requirement that all secondary students who desire to participate in interscholastic athletics undergo a physical examination prior to such participation.
- ARC 9476B The rescission of 36.15(6)“c” eliminates confusion regarding “open gyms” so that local school administrators may, at their discretion, manage their own athletic facilities. In response to an inquiry by Rep. Heaton, Ms. Greta clarified that the rule retains all current prohibitions against out-of-season contact by coaches of students in grades 9 through 12 during the school year.
- ARC 9472B Amendments to 43.32 pertain to school bus driver training. Ms. Greta clarified for Rep. Pettengill that all bus drivers must have the same training and meet the same standards.
- ARC 9474B No action on ch 81, standards for school business official preparation programs.
- ARC 9473B The amendment to 96.4(2)“h” conforms the rules with Generally Accepted Accounting Principles (GAAP) by removing the reference to unreserved, undesignated fund balances. Rep. Pettengill inquired about the department’s awareness of the movement from GAAP to International Financial Reporting Standards (IFRS). In response, Ms. Greta agreed to provide the committee with further information after conferring with the department’s school finance team. Ms. Greta clarified for Sen. Kibbie the context for 96.4(2)“h,” which relates to certificates of need for school districts with specific enrollments.
- On behalf of the committee, Sen. Heaton expressed sympathy to Ms. Greta upon the recent death of her husband.

PROFESSIONAL LICENSURE DIVISION Pam Griebel, assistant attorney general, represented the division.

- Special Review At the April meeting, a proposed amendment regarding what is considered conclusive evidence relating to conviction of a crime was reviewed, specifically, the effect of conviction or sentence that was deferred. Rep. Olson requested that the proposed amendment be placed on the May agenda so that the rationale for the amendment could be discussed.
- Ms. Griebel stated that the Iowa Supreme Court in *Schilling v. Department of Transportation* (2002) concluded that, for purposes of licensure and discipline, a deferred judgment does count as a conviction. Ms. Griebel stated that if a crime is related to the profession, a deferred sentence or a deferred judgment may be considered by a board in matters of licensure and discipline in order to protect the public, not to punish the licensee.
- Rep. Olson inquired about the differences among boards in language regarding conviction of a crime. In response, Ms. Griebel stated that each board adopts its own rules and that the professions and their statutory provisions differ. Ms. Griebel agreed to request that staff make the language regarding deferred judgments more consistent within the rules of the 19 professional licensure boards.
- In response to Rep. Olson’s concern about the fairness of action taken on a license when the deferred judgment is not related to the practice of a profession and that the loss of occupation resulting from license denial might lead a person to reoffend, Ms. Griebel stated that a board would determine if the deferred judgment or a conviction outside of the deferred judgment is related to the profession and would consider all underlying facts.
- Ms. Griebel confirmed for Sen. Bartz that an increase in the number of deferred judgments is one of the reasons for the rule making, and Sen. Bartz suggested that perhaps a statutory change regarding deferred judgments is needed. Ms. Findley expressed appreciation for the discussion, in particular, the need for uniformity in the language of the rules.

REVENUE DEPARTMENT Dale Hyman represented the department. Other interested parties included Neil Morgan, Ringgold County assessor.

- ARC 9478B Amendments to ch 71 pertain to valuation of agricultural real estate for property tax purposes. Mr. Hyman stated that the rule making updates references and documents current practices.

Revenue Department (continued)

Mr. Morgan stated that the agricultural productivity formula is outdated and inequitable and expressed particular concern about hay and pasture valuation. Mr. Morgan stated that, through administrative and legal channels, he will challenge the formula and its implementation by the department.

Rep. Pettengill requested that the committee be provided with Mr. Morgan’s testimony. Sen. Kibbie suggested that assessors as a group request statutory changes. Sen. Bartz inquired about the productivity formula and its relationship to property value. In response to committee members, Mr. Hyman suggested that any changes in the formula be based on an independent study with input from the governor’s office and the legislature. Mr. Morgan agreed that it is time for that study.

PUBLIC HEALTH DEPARTMENT Barb Nervig represented the department.

ARC 9443B No action on ch 131, emergency medical services provider education/training/certification.

ARC 9444B No action on amendments to chs 132 and 136 requiring electronic data submission of ambulance report data.

ARC 9445B No action on amendments to 134.2(3) pertaining to trauma care and facility categorization criteria adopted by reference.

Special Review The department requested a special review of two emergency rule makings prior to their adoption on May 11, though the change in the committee’s meeting date from May 10 to May 11 precluded review before adoption by the board at their meeting also held on May 11.

The first rule making regarding ch 88, the volunteer health care provider program (VHCPP), was filed emergency after notice. Ms. Nervig reported that the department has met with the dental board and has determined that additional discussion is needed before proceeding with the rules that pertain to dentists and VHCPP. Thus, the proposed rules pertaining to dentists and the VHCPP were not adopted. Ms. Nervig stated that the department had received letters in support of the rules from the Iowa Medical Society and Polk County Medical Society.

Ms. Nervig stated that the second rule making regarding ch 88, which is a double barrel, will allow for additional volunteers in protected clinics by permitting health care profession students to volunteer at the clinics. Ms. Nervig noted that the health care profession institution or the protected clinic will provide general and professional liability insurance to cover the students. Ms. Nervig stated that the emergency rule making will allow interested students to participate during summer session and that advocates for the rules believe that, as a result of this opportunity, students will volunteer when they become licensed professionals. Rep. Heaton expressed appreciation for the inclusion of students in VHCPP.

STATE PUBLIC DEFENDER Mark Smith represented the state public defender.

ARC 9447B No action on amendments to chs 7, 11 and 12 pertaining to attorney fee contracts in appellate cases and to fee limitations.

TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA Tami Fujinaka represented the commission.

ARC 9469B No questions regarding proposed amendments to ch 1 relating to the advisory committees of the commission and the organizational structure of the ICN.

UTILITIES DIVISION Mary Whitman represented the division.

ARC 9494B Amendments to ch 44 pertain to certificates of franchise authority for cable and video service. In response to an inquiry by Sen. Bartz, Ms. Whitman clarified that the changes from the notice were editorial.

VETERANS AFFAIRS, IOWA DEPARTMENT OF Jodi Tymeson represented the department.

ARC 9471B Amendments to ch 11 expand coverage under the injured veterans grant program. Discussion pertained to the possible submission of these rules under notice of intended action and the anticipated program funding required in the budget.

ARC 9492B This rule making will be reviewed at the June meeting.

ENVIRONMENTAL PROTECTION COMMISSION Jim McGraw, Catharine Fitzsimmons, Wayne Gieselman, and Alex Moon represented the commission. Other interested parties included Rick Heller on behalf of the Iowa County Landfill, Cindy Turkle on behalf of Turkle-Clark Environmental Consulting, and Hal Morton on behalf of the Des Moines County Regional Solid Waste Commission (DMCRSWC).

Regulatory Analysis At the March meeting, the committee voted to request a formal regulatory analysis on ARC 9366B, which pertains to five options for the funding of the Title V air quality program. In an update regarding this rule making, Mr. McGraw stated that, in the coming months, the department will confer with the Iowa Association of Business and Industry (ABI) and other interested stakeholders regarding alternative funding mechanisms.

In response to an inquiry by Sen. Bartz about the status of the five options and the 2012 budget, including ongoing implementation of federal standards, Ms. Fitzsimmons clarified that the requirements and needs listed in Table 10 of the regulatory analysis are unfunded in the 2012 budget. Ms. Findley asked about the inclusion of costs in the 2012 budget for federal requirements not yet in effect and about the effect of an economic upturn on fees if emissions are reduced. In response, Ms. Fitzsimmons explained that certain ongoing requirements are related to new requirements and, though emissions are decreasing and the fee will remain at \$56 per ton, that new construction permits for new facilities will be required. In response to an inquiry by Rep. Heaton, Ms. Fitzsimmons noted alternative methods of funding, including reallocation reflected in the federal formula for funding to states, consideration of other states' funding methods, and collaboration with ABI and other stakeholders on alternatives. Ms. Fitzsimmons summarized for Rep. Pettengill the permitting process for minor sources. Sen. Kibbie requested that the department identify and provide the locations of the contacts that have requested assistance (e.g., school boards).

Special Review Rep. Pettengill requested a special review of ch 113, specifically, landfills and their relationship to federal requirements. These rules were reviewed by the committee in 2007, and the review led to an objection that remains in place.

Mr. Heller expressed concern about requirements for cell liners, the cost of meeting those requirements, and the department's approval process. Ms. Turkle expressed the opinion that the rules exceed federal requirements and concern about the department's interpretation of the rules, specifically, the view that cells constructed and landfills closed under earlier rules are regulated under current rules. Mr. Morton expressed the opinion that existing contamination comes from old unlined areas and suggested that the monitoring scheme stated in the rules, in particular, the point of compliance, be adjusted in order to maintain protection of groundwater sources, to provide greater flexibility to landfills, and to control increasing costs.

Given that an objection to the rule remains in place, committee members reviewed the options of the affected parties: a lawsuit by landfills against the state, a petition for rule making, a request for waiver, and an action by the governor. Mr. Royce stated that, in his opinion, a petition for rule making is a useful approach only when the affected party and the department have already agreed to change the rule since the department's action is completely voluntary. Mr. Royce noted that the criteria for a waiver are restrictive, and the department must have agreed to grant a waiver. Ms. Findley added that a waiver would require that the burden of proof lie with the party requesting the waiver, i.e., the affected landfill, and that the clear and convincing evidence standard would be required. In response to an inquiry by Rep. Pettengill, Ms. Findley stated that the governor cannot nullify a rule except within 70 days of its effective date. The increasing costs of landfills, the department approval process and the department's responsibility to implement federal regulations were also discussed.

Mr. Gieselman distributed copies of a regulatory comparative analysis prepared in February 2007, which compared Iowa's then proposed rules with those of neighboring states to determine whether Iowa's rules were more restrictive than other states' rules or federal regulations. In addition, Mr. Gieselman summarized the process for the adoption of ch 113 and noted that affected parties were generally supportive of the rules at the time of their adoption. He stated that a cost/benefit analysis should include future cleanup costs.

Environmental Protection Commission (continued)

Mr. Moon stated that the main change in the rules was that the point of compliance must be at the same location as the monitoring well network (50 feet from the waste boundary). He explained that, though federal rules allow an alternative liner, that liner must be modeled by using the same criteria as those of an engineered liner, i.e., 1/8-inch flexible membrane liner (FML) above two feet of clay. He stated that the approval process for an alternative liner requires time for department verification of the assumptions on which the engineering modeling is based and indicated that department staff review every proposal for an alternative liner. He confirmed that if an affected party filed a petition for rule making to request that the state’s prescribed liner be changed, the department would be required to petition EPA for approval of an alternative liner; in the past, the department has petitioned EPA and was denied.

PETROLEUM UNDERGROUND STORAGE TANK FUND BOARD, IOWA COMPREHENSIVE

David Steward represented the board.

- ARC 9461B No questions on proposed amendment to 11.2(8) regarding the waiver of the copayment requirement for innocent landowner claims.
- ARC 9460B No questions on proposed 11.3(11) concerning eligible costs related to the closure of an underground storage tank system.

HUMAN SERVICES DEPARTMENT Nancy Freudenberg, Ann Wiebers, Jason Smith and Jennifer Vermeer represented the department. Other interested parties included Kristie Oliver of the Coalition for Family and Children’s Services in Iowa and Tom Cope of Orchard Place.

- ARC 9439B No action on amendments to chs 41 and 75 relating to family investment program (FIP) and Medicaid for noncitizens.
- ARC 9479B Proposed amendments to 75.1(39)“b” provide the annual update of premium levels for employed people with disabilities and revise the payment address. In response to an inquiry by Sen. Bartz, Ms. Wiebers explained the highest percentage of the federal poverty level and the correlating monthly premium in 75.1(39)“b”(3).
- ARC 9440B Amendments to chs 77 and 79 pertain to assertive community treatment. In response to an inquiry by Rep. Heaton, Ms. Vermeer stated that an advanced registered nurse practitioner with psychiatric certification may perform the duties of a psychiatrist on an assertive community treatment team.
- ARC 9448B This amended notice proposes additional changes to chs 78, 79 and 90 pertaining to coverage and payment provisions for Medicaid case management services. Ms. Freudenberg stated that the primary change is the removal of the requirement that emergency access to the case manager be made available 24 hours per day. In response to an inquiry by Sen. Kibbie, Ms. Freudenberg stated that the public comments received about the notice were in regard to the length of the case management form, which is still under discussion.
- ARC 9441B No action on amendments to 109.6(5)“c” pertaining to record checks for volunteers or substitutes at child care centers.
- ARC 9481B Proposed ch 31 pertains to the policies for the civil commitment unit for sexual offenders housed at the Cherokee Mental Health Institute. In response to an inquiry by Sen. Bartz, Mr. Smith stated that, since 2002, the procedures and practices governing the unit have mirrored those of the mental health institute.
- ARC 9487B Amendments to chs 77 to 79 and 88 concern the transitioning of remedial services from a fee-for-service program administered by the Iowa Medicaid enterprise to behavioral health intervention administered by the Iowa Plan for Behavioral Health, which is a managed care program under contract to Iowa Medicaid. Ms. Oliver commended the collaborative work of the remedial transition committee and other providers and expressed support for the changes in the standards for staff. Mr. Cope expressed support for the rules.
- ARC 9497B Proposed amendments to chs 78 and 83 pertain to the HCBS intellectual disability waiver. Rep. Heaton commended the effort to set forth rules regarding children’s mental health. In response to an inquiry by Rep. Pettengill, Ms. Vermeer stated that CMS requires a statewide waiting list to allow uniform management and that the estimate of the costs to the state for this change has been included in the budget. Rep. Heaton added that county waiting lists will be addressed in an appropriation bill.

Human Services Department (continued)

- ARC 9488B Amendments to chs 105, 114 and 115 relate to foster group care facilities and juvenile shelter and detention facilities. Ms. Freudenberg stated that, in response to a suggestion by Sen. Bartz, 114.20(3) has been changed to make restraint provisions uniform across shelter, detention, and foster group care facilities. In response to an inquiry by Sen. Horn, Mr. Smith described the interventions that have been used to prevent a child from injury to self, to others, or to property.
- ARC 9489B No action on ch 155, child abuse prevention program.
- ARC 9490B The amendment to 170.4(2)“a” updates the child care assistance fee schedule for state fiscal year 2012 based on federal poverty income guidelines issued in 2011. Ms. Freudenberg clarified the hours per unit of service and the unit fee for child care.
- ARC 9491B No action on amendments to ch 172, family-centered child welfare services.

REAL ESTATE COMMISSION

- ARC 9486B This rule making will be reviewed at the June meeting.

NATURAL RESOURCE COMMISSION Susan Stocker, Kelly Smith, Tamara Mullen and Willie Suchy represented the commission. Other interested parties included Neila Seaman on behalf of the Sierra Club, Matthew O’Connor on behalf of Pheasants Forever, and Denny Bakor and Lyle Goodrich, members of the public.

- ARC 9446B Amendments to ch 45 pertain to horsepower limitations for boat motors. Discussion pertained to the rationale for and enforcement of the rule.
- ARC 9496B Rules 22.10 to 22.15 relate to procedures to be used by the department to develop a three-year pilot program to open private lands to public hunting while providing landowners grant funds to create, manage, and enhance wildlife habitat. In response to an inquiry by Rep. Heaton, Ms. Smith clarified the benefit of the program to the landowner and the issue of liability.
- ARC 9495B Proposed 97.6 sets the season dates, bag and possession limits, shooting hours, and areas open to hunting for mourning doves. Mr. Suchy clarified that the prohibition on use of lead shot for waterfowl does not apply to mourning doves. Discussion pertained to the use of lead shot, the determination of the bag limits, the use of food plots, and creation and reporting of jobs.
Ms. Seaman expressed opposition to the rules and, in particular, requested that if a mourning dove season is established, the use of lead shot be prohibited. Mr. O’Connor, Mr. Bakor and Mr. Goodrich expressed support for the rules.

Committee business

The minutes of the April 11, 2011, meeting were approved.

The next meeting was scheduled for Tuesday, June 14, 2011, at 9 a.m.

At the request of Sen. Horn, Mr. Royce reviewed for new members the procedures, the types of rule makings, the range of committee actions on filed rules, including delays, general referrals, and objections, and gubernatorial objections and nullifications.

The committee gave the Administrative Code Editor permission to publish in the May 18, 2011, Iowa Administrative Bulletin a notice from the Federal Emergency Management Agency (FEMA) regarding FEMA’s intent to reimburse state and local governments and agencies and eligible private nonprofit organizations for eligible costs incurred to repair and/or replace facilities damaged by the severe storms, tornadoes, and straight-line winds during the period of April 9-10, 2011.

Adjourned The meeting was adjourned at 2:58 p.m.

Respectfully submitted,

Stephanie A. Hoff

APPROVED:

Chair Wally Horn

Vice Chair Dawn Pettengill