

**MINUTES OF THE AUGUST 2015 MEETING
OF THE
ADMINISTRATIVE RULES REVIEW COMMITTEE**

- Date of meeting: The regular, statutory meeting of the Administrative Rules Review Committee (ARRC) was held on Tuesday, August 11, 2015, at 9 a.m. in Room 103, State Capitol, Des Moines, Iowa.
- Members present: Representative Dawn Pettengill, Chair, and Senator Wally Horn, Vice Chair; Senators Mark Chelgren, Mark Costello, Thomas Courtney [by teleconference], and Pam Jochum; Representatives Lisa Heddens, Megan Jones, Rick Olson, and Guy Vander Linden were present.
- Also present: Jack Ewing and Tim Reilly, Legal Counsel; Stephanie A. Hoff, Administrative Code Editor; Larry Johnson, Administrative Rules Coordinator; fiscal staff; caucus staff; and other interested parties.
- Convened Rep. Pettengill convened the meeting at 9:02 a.m.
- Fiscal overview** Adam Broich presented the LSA fiscal report. In response to an inquiry from Rep. Pettengill, Mr. Broich stated that for ARC 2059C, there would be no fiscal impact to local or state government.

HUMAN SERVICES DEPARTMENT Nancy Freudenberg represented the department. Other interested parties included George Eichhorn on behalf of ChildServe.

ARC 2062C No questions on proposed amendments to chs 24, 25, 78, 79, 83, 88 and 90 pertaining to an update of references, codes and diagnoses related to medical resource manuals.

ARC 2061C Proposed amendments to 77.22 and 80.2 pertain to provider participation requirements for psychologists and to claim forms. Ms. Freudenberg stated that the amendments update the rules to reflect the current credentialing requirements of the National Register of Health Service Psychologists and current Form UB-04 CMS. Mr. Eichhorn requested that the committee exercise caution regarding the rule making. He explained that the amendments would require doctoral-level training for the licensure of all psychologists in Iowa and, as a result, would cause a small number of psychologists who had been granted licensure at the master’s-degree level to be disqualified from practicing in Iowa and from being paid by Medicaid. Rep. Olson requested that Mr. Eichhorn work with the department on the language of the rule to address the licensure issue. In response to a question from Sen. Jochum, Mr. Eichhorn stated that the number of master’s-degree level psychologists affected by the amendments is small and that the search for candidates to fill vacant child psychologist positions has taken up to 18 months.

ARC 2050C Amendments to chs 78 and 83 concern transportation and supported community living services under the home- and community-based services (HCBS), brain injury, and intellectual disability waivers. In response to an inquiry from Rep. Pettengill, Ms. Freudenberg stated that a client will contact a transportation broker to arrange for nonemergency medical transportation. Rep. Heddens commented on the need for maintaining accessibility to transportation under the new policy. In response, Ms. Freudenberg stated that the department will monitor the program and make adjustments as necessary.

ACCOUNTANCY EXAMINING BOARD Robert Lampe and Pam Griebel represented the board.

ARC 2058C No questions on proposed amendments to chs 1, 3, 5 to 8, 10, 11, 13 and 14 pertaining to updates based on Senate File 198, attest services, license renewal, mandatory disclosures, continuing education, and resource updates. Mr. Lampe summarized the amendments. Ms. Griebel explained that based on public comment, a clarification will be made in the filed amendments regarding peer review.

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT Margaret Thomson and Neal Vaughn represented the department. Other interested parties included Gabriel Gorman, Daniel Forsyth and Austin Forsyth on behalf of Quality Plus Manufacturing, Inc. (Quality Plus); and Craig Dobbins of Craig’s Restoration and Repair, LLC.

Agriculture and Land Stewardship Department (continued)

ARC 2059C

Amendments to 43.6 concern national safety standards for the storage and handling of anhydrous ammonia. Ms. Thomson stated that the department, as charged by statute, has adopted the most recent national standards by reference in administrative rule 43.6, including revised standard 5.10.3. This standard requires pressurization of tanks only with ammonia vapor and would preclude the use of Flow Assist®, a technology manufactured in Iowa by Quality Plus, which uses oxygen for pressurization. Ms. Thomson stated that the states of Minnesota and Indiana have adopted administrative rules that prohibit the use of Flow Assist®. She distributed information that includes comments from the U.S. Environmental Protection Agency (EPA), the U.S. Department of Transportation (USDOT) and major tank manufacturers that express concern about the presence of oxygen in a tank, which may contribute to stress corrosion cracking (SCC) and may lead to an explosion.

Mr. Gorman requested on behalf of Quality Plus that a session delay be imposed on administrative rule 43.6 to allow for review by the legislature of revised standard 5.10.3. He asserted that no state has adopted revised standard 5.10.3, though some states have addressed SCC in rule, and that the revised standard would not permit oxygen for pressurization. Mr. Gorman stated that public safety is paramount and that studies do not support the contention that SCC poses an imminent risk or that Flow Assist® creates a risk. He added that existing standard 5.10.3 has been in effect for 25 years and that Flow Assist® has been in use for 10 years without any incident. Mr. Dan Forsyth, a farmer and founder of Quality Plus, summarized the history of the company's products, including its research, development, and testing methods, and stated that Flow Assist® has been and is currently being sold and safely used in the application of anhydrous ammonia. He cited the letters of unanimous support by clients who have purchased Flow Assist®. Mr. Austin Forsyth stated that the amendment will affect environmental stability, reduce the productivity of farmers who use Flow Assist®, and undermine innovation in agriculture. He requested a session delay to allow further review of Flow Assist® and to find a collaborative solution.

While acknowledging the innovation of Quality Plus products, Mr. Dobbins, a pressure vessel welder, welding instructor and tank inspector, summarized his experience in the repair of anhydrous ammonia tanks, asserted that ammonia tanks should only be pressurized with ammonia vapor, and expressed concern regarding the safety of Flow Assist®, which introduces oxygen in tanks that are not designed for oxygen use. He noted that EPA requires revised standard 5.10.3, and he questioned opposition by the state to a standard that EPA is already implementing. Mr. Dobbins also expressed concern regarding the safety of his staff and students who repair tanks.

In the course of the discussion, committee members inquired about separation distances; exceptions to certain standards; anhydrous ammonia tanks, including the construction, operation, testing, repair and longevity, and to accidents; the Flow Assist® system, including design, testing, modifications and safety; the liability of manufacturers and of owners of tanks and the parameters of liability insurance; the effect of Flow Assist® on the environment; the effect of the revised standard on future innovation; and the fiscal impact of the revised standard.

Committee members expressed concern about the effect of revised standard 5.10.3 on technology that is designed, sold and used in Iowa and about the questions raised by the department regarding the safety of the technology. Members then discussed possible actions that would lead to legislative review. Sen. Jochum assured the committee that a session delay would be referred in a timely fashion to the appropriate committees of the senate.

Motion to delay

Rep. Vander Linden moved a session delay on 43.6.

Motion carried

On a roll call vote of 7 to 3, the motion carried.

INSPECTIONS AND APPEALS DEPARTMENT David Werning represented the department.

ARC 2067C

No questions on proposed amendments to 67.14 pertaining to informal conferences and contested case hearings related to elder group homes, assisted living programs, and adult day services.

Inspections and Appeals Department (continued)

ARC 2068C No action on amendments to ch 71, related to subacute mental health care facilities, that concern publicly funded facility beds and the treatment of persons involuntarily hospitalized under Iowa Code chapter 229.

PUBLIC HEALTH DEPARTMENT Kala Shipley represented the department.

ARC 2066C No questions on proposed amendments to 108.3 and 108.4 concerning the medical residency training state matching grants program. Rep. Pettengill commended the department for the amendments, which precisely follow the legislation.

PUBLIC SAFETY DEPARTMENT Barb Edmondson and Brian Young represented the department.

ARC 2057C Proposed amendments to chs 501, 502, 505 and 550 pertain to the electrician and electrical contractor licensing program, postsecondary education programs, and the electrical inspection program and inspector qualifications.

Rep. Pettengill expressed concern that the amendments in Item 7, which remove the building code commissioner from supervision of the electrical inspection program, could allow the electrical examining board to overrule the fire marshal, who has only one vote on the board. Mr. Young stated that the changes reflect reorganization of internal operations by the building code commissioner and that ultimate decision making rests with the department. Ms. Edmondson added that the electrical examining board oversees licensing only and has no regulatory authority granted by statute or by administrative rule. In Item 6, Rep. Pettengill objected to the removal from 505.102(2) of the specific number of hours related to a course of study and, in general, to the removal of specific requirements from a rule which leave the rule open to broader interpretation.

Mr. Johnson stated that the department has ultimate decision-making authority in regard to the electrical inspection program. Mr. Young and Ms. Edmondson agreed to request that the board review the amendments based on concerns expressed by Rep. Pettengill.

REGENTS BOARD Jason Pontius represented the board.

ARC 2051C Amendments to ch 1 pertain to criteria for admission to state universities. Mr. Pontius explained that an alternative formula for admission, i.e., the alternative regent admission index, will be used for the admission of prospective undergraduate students whose high schools do not provide class rank.

In response to inquiries from Sen. Horn, Sen. Chelgren and Rep. Pettengill, Mr. Pontius stated that the alternative formula does not create an advantage or disadvantage for any students, that the formula was created based on three years of data, and that the alternative formula will be used by all three universities. In addition, Mr. Pontius described how course equivalents are determined and applied to the formula. He explained that the decision to rate high schools based on level of difficulty and to adjust the formula accordingly would rest with the board of regents.

REVENUE DEPARTMENT Victoria Daniels and Julie Roisen represented the department.

ARC 2060C No questions on proposed amendments to 71.1(5) pertaining to dual classification related to multiresidential real estate assessments. Ms. Daniels explained that a change will be made in the filed amendments to language related to dual-classified industrial and commercial property.

Sen. Jochum confirmed that the amendments fulfill the original intent of the 2015 legislation, and Rep. Pettengill thanked the department for its responsiveness.

NATURAL RESOURCE COMMISSION Kelly Myers and Tamara McIntosh represented the commission.

ARC 2055C Proposed 14.9 pertains to the exemption related to concessions at Honey Creek Resort State Park. Ms. Myers stated that under the proposed rule, the management of Honey Creek Resort (HCR) would be exempt from the concessions rules in ch 14 and would instead be governed by competitively bid contracts. She explained that this approach will ensure that a valuable state resource is maintained with minimal public financial and administrative resources. She noted that both the National Park Service and many state park systems, including those in South Dakota, Nebraska, Ohio and Tennessee, use a broader concessions authority to manage their hospitality operations in parks.

Natural Resource Commission (continued)

In response to a question from Sen. Horn, Ms. Myers stated that private donations to finance park improvements, such as a bridge at HCR, are welcome. In response to an inquiry from Sen. Chelgren, Ms. Myers stated that friends groups are private entities that invest in state-owned facilities, such as those at Lake Darling State Park. Sen. Chelgren suggested that the department consider collaborating with the department of transportation, which allows private-entity promotion at rest areas.

ARC 2052C No action on amendments to 61.5(1) and 61.15 pertaining to cabins and open shelters at state parks and recreation areas and to an update of park rules for Honey Creek Resort State Park.

ENVIRONMENTAL PROTECTION COMMISSION Director Chuck Gipp, Diane Moles, Mark Moeller, Chad Fields and Joe Griffin represented the commission. Other interested parties included Don Perschau on behalf of the Southfork development in Waukee; Virginia Soelberg; Susan Heathcote of the Iowa Environmental Council; John Morrissey of 1000 Friends of Iowa; Neila Seaman of the Sierra Club, Iowa chapter; and Creighton Cox of C2 Policy Advocates.

ARC 2053C No action on amendments to 50.2, 52.4(3), 52.9(3) and 53.7 relating to withdrawal of water from the Cambrian-Ordovician (Jordan) aquifer.

In response to a question from Sen. Horn, Mr. Fields explained how the withdrawal of water from the Jordan aquifer will be administered. In response to an inquiry from Sen. Chelgren, Mr. Fields explained that wells used to inject surface water into the aquifer are not affected by these amendments.

ARC 2054C The amendment to 64.15(2) adopts by reference an amendment to NPDES general permit no. 2 relating to topsoil preservation at construction sites.

Mr. Gipp stated that the federal Environmental Protection Agency (EPA) mandated in 2010 that states adopt rules for control of storm water by preserving topsoil in residential developments. In 2012, with the input of a stakeholder group, the commission adopted by reference the existing permit provision that requires permittees to preserve at least four inches of topsoil at construction sites when preservation is consistent with land use practices and if at least four inches of topsoil existed on the site prior to construction. This provision has been commonly referred to as “the four-inch topsoil rule.”

Mr. Griffin explained that the feasibility of the four-inch topsoil rule was questioned by the residential development community, which had found the cost of compliance to be higher than projected in 2012. He stated that the commission initiated the current rule-making process at the request of the development community and that an EO 80 stakeholder group was formed to provide input regarding the four-inch topsoil rule.

The adopted amendment revises general permit no. 2, which authorizes the discharge of storm water from construction sites, to remove the requirement that permittees preserve at least four inches of topsoil at construction sites and to require instead that permittees preserve topsoil unless infeasible. In the permit, the term “infeasible” is defined as “not technologically possible or not economically practicable and achievable in light of the best industry practices.” Mr. Gipp stated that the purpose of the amendment is to ensure water quality by providing sufficient topsoil to control storm water runoff as mandated by EPA.

Discussion pertained to the impetus for the amendment; federal requirements versus state requirements; the composition and role of the EO 80 stakeholder group; public and stakeholder comment regarding the amendment; the rule-making process, including alternatives to the amendment; disclosure to the buyer regarding the ownership of and the rights to the soil on the property at the time of construction; responsibility for enforcement; and the cost to and other consequences for homeowners.

Environmental Protection Commission (continued)

Mr. Griffin stated that the language of the amendment mirrors that of the federal requirements regarding the preservation of topsoil and noted that the requirement applies to any site on which construction disturbs one acre or more. He also clarified the responsibility of cities (i.e., larger metro areas) for enforcement of permit provisions related to runoff during construction and the responsibility of the department, through the department's permits to cities, for enforcement of post-construction runoff. Mr. Griffin acknowledged that by a ratio of ten to one, public comment was in opposition to the amendment and that no cost-benefit analysis could be conducted.

Mr. Johnson stated that an EO 80 stakeholder group does not have rule-making authority and that, while taking into account public and stakeholder comment, the department does not cede any rule-making authority in the stakeholder group process.

Mr. Perschau expressed opposition not only to the amendment but also to the existing four-inch topsoil rule, citing siltation of ponds and waterways in his development, and expressed doubt about the amendment because the existing four-inch topsoil rule has not been effective. Ms. Soelberg requested that the committee delay or object to the amendment, which does not set forth specific requirements for implementation, and expressed concern regarding the rule-making process, verification of compliance, the costs to communities and homeowners, and enforcement. Ms. Heathcote pointed out that the existing rule provides a quantifiable standard for topsoil across a construction site and expressed concern that the vague revised rule will be difficult to implement and enforce. Mr. Morrissey requested that the amendment be revisited by the commission based on a cost-benefit analysis of topsoil retention on building lots to determine the direct costs to homeowners and to substantiate the costs claimed by the development community. Ms. Seaman requested that the committee either delay or object to the amendment and expressed concern regarding the influence of the development community in the rule-making process; limited public notice or opportunity to participate; and the vagueness of the term "infeasible," which allows for a broad interpretation.

Mr. Cox addressed the increased cost to the development community, stated that the EO 80 stakeholder group did not write the rule, noted that six nearby states have adopted the federal language, and pointed out that the amendment requires that disturbed soil must remain within the area covered by the applicable permit authorization.

Committee members expressed concern about whether sufficient topsoil will be preserved and about disclosure and costs to homeowners and expressed uncertainty about the appropriate standard for preserving topsoil.

Motion to delay
Motion failed
Motion to refer
Motion carried

Sen. Jochum moved a session delay on ARC 2054C.

On a roll call vote of 5 to 3, the motion failed.

Sen. Jochum moved a general referral of ARC 2054C.

On a roll call vote of 8 to 1, the motion carried.

Sen. Jochum requested that the department provide the committee with a cost-benefit analysis of the rule making.

Sen. Chelgren stated that the department should be held accountable for its intent that a buyer should never need to import topsoil. To that end, he stated that legislation is currently being drafted to ensure that removal of topsoil from a property at any time during a 20-year period must be disclosed in the seller's contract.

Committee business

The minutes of the July 14, 2015, meeting were approved.

The next meeting was scheduled for Tuesday, September 8, 2015, at 9 a.m.

Following up on a question raised at the July meeting, Mr. Ewing explained that the notation of statutory language verbatim within administrative rules would be technically complex and difficult to implement and will require further discussion within LSA. He noted that the insertion in the rules of hyperlinks to the Iowa Code is in process.

August 11, 2015

Committee business (continued)

Adjourned The meeting was adjourned at 12:40 p.m.

Respectfully submitted,

Stephanie A. Hoff

APPROVED:

Chair Dawn Pettengill

Vice Chair Wally Horn