



Iowa General Assembly

2008 Committee Briefings

Legislative Services Agency – Legal Services Division

<http://www.legis.state.ia.us/asp/Committees/Committee.aspx?id=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

Meeting Dates: [January 9, 2009](#) | [December 9 and 10, 2008](#) | [November 7, 2008](#) | [October 14, 2008](#) | [September 9, 2008](#) | [August 12, 2008](#) | [July 8, 2008](#) | [June 11, 2008](#) | [May 13, 2008](#)

Purpose. *This compilation of briefings on legislative interim committee meetings and other meetings and topics of interest to the Iowa General Assembly, written by the Legal Services Division staff of the nonpartisan Legislative Services Agency, describes committee activities or topics. The briefings were originally distributed in the Iowa Legislative Interim Calendar and Briefing. Official minutes, reports, and other detailed information concerning the committee or topic addressed by a briefing can be obtained from the committee's Internet page listed above, from the Iowa General Assembly's Internet page at <http://www.legis.state.ia.us/>, or from the agency connected with the meeting or topic described.*

ADMINISTRATIVE RULES REVIEW COMMITTEE

January 9, 2009

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ENVIRONMENTAL PROTECTION COMMISSION, Landfill Regulation, 12/17/08 IAB, ARC 7474B, ADOPTED.

Background. Late in 2006, the Department of Natural Resources commenced rulemaking to rewrite an existing program relating to the construction, operation, and closure of municipal solid waste landfills, implementing the federal Resource Conservation and Recovery Act (RCRA) and the federal rules implementing that Act. Earlier state rules had been in place since 1997. Following numerous reviews, in December 2007, the Committee placed an objection on a significant portion of those rules. Members felt that the new provisions are being applied retroactively. The Committee then filed an objection to this filing; members believed that landfills in compliance with the previous rules were in essence "grandfathered" in place by those rules. The effect of an objection is to reverse the burden of proof when the validity of a rule is challenged in a judicial action. An objection forces the agency to prove the validity of its rule.

Commentary. With the adoption of these new provisions, the objection placed on the previous version of that subrule is void; an objection applies only to the language of a rule as it existed at the time of the committee action. If the Committee wishes to replace the objection, another vote is required. These rules allow existing landfills to continue to use previously approved landfill cells which have a basal liner and leachate collection system until those cells have been filled. A number of landfills argued for a renewal of the 2007 objection, contending that the new rules still improperly restrict the use of existing landfill cells. Department representatives stated that the new rules clarified that construction of a liner is only necessary if waste disposal capacity remains in areas that do not already have a liner beneath them. The representatives also stated that 15 of the 19 landfills in the state will see a significant benefit from the new rule in that no additional construction is necessary.

After debate, Committee members considered a motion to renew the 2007 objection; the motion failed.

Action. Motion to object failed; additional review is anticipated at the February meeting.

PROFESSIONAL LICENSURE DIVISION, Board of Physical and Occupational Therapy, 12/17/08 IAB, ARC 7442B, NOTICE.

Background. The division's proposed amendments update practice requirements for physical and occupational therapy licensure. The proposed rules prohibit a physical therapist from accepting professional employment or receiving compensation from a prescriber or a business in which a prescriber of physical therapy has a proprietary or beneficial interest. The proposed rules also prohibit a physical therapist from leasing space from a prescriber of physical therapy. The proposed rules also address the definition of "occupational therapy screening."

Commentary. The division conducted a public hearing with 19 attendees and has received over 130 written comments. The Committee heard comments from members of the public, including members of affected groups and physicians.

Concerns were raised about the need for these proposed rules and the indirect impact the rules would have on physicians, who are not regulated under these provisions. Several physicians commented on the rules and indicated that they would cause fragmentation in the provision of physical therapy services. The division indicated that the rules were in response to patient complaints and the need to ensure that patients were allowed to choose their physical therapy provider without improper influence of the prescriber. The division also stated that current rules relating to fee splitting are insufficient to address the problem. The proposed rules were drafted using the rules governing pharmacists as a model.

Action. General referral to the General Assembly for review.

PUBLIC HEALTH DEPARTMENT, Continuing Education for Plumbing and Mechanical Systems Professionals, 12/17/08 IAB, ARC 7429B, NOTICE.

Background. 2007 Iowa Acts, ch. 198 (H.F. 908), directed the department to establish continuing education requirements for plumbers and mechanical systems professionals. The proposed rules establish a biennial continuing education compliance period, establish hour requirements, and address the standards governing the criteria for continuing education activities. The rules provide for audits to review compliance with continuing requirements and require licensees to retain information about their continuing education courses for a period of two years. A licensee who is the subject of an audit is ineligible for license renewal until the completion of the audit.

Commentary. Members of the Committee questioned the effect the proposed rules and any review by the licensing board would have on persons who have been convicted of a felony. Concerns were also raised regarding the procedure for conducting an audit and the rule preventing a license renewal if that licensee is the subject of an audit. The department indicated that an extension of the license could be granted by the board during the pendency of the audit.

Action. No action taken.

TRANSPORTATION DEPARTMENT, Close-clearance Warning Signs, 12/17/08 IAB, ARC 7452B, NOTICE TERMINATED.

Background. 2007 Iowa Acts, ch. 164 (S.F. 472), requires the owner of a railroad track to place a warning device at a location where there is "close clearance" between the track and a building, machinery, trees, brush, or other object which impedes a person who is riding the side of a train. The department published a notice of intended action in July 2007. Stakeholders complained this was the weakest regulation in the nation and urged the adoption of a more comprehensive national code to ensure proper worker safety. At the September 2007 Committee meeting, members requested that the department meet with stakeholders and resolve this issue.

Commentary. Subsequent discussions have not resolved these differences, and the six-month window for adopting the proposal has passed, requiring that the proposal be renoticed in 2009. It was noted that rulemaking to implement this statutory mandate will take almost two years to complete. Department representatives stated that the delays were due to extensive discussions with stakeholders, and reiterated their position that the statute provides only for safety clearances, not the adoption of an entire code of regulations.

Action. No action taken.

UTILITIES BOARD, Electric Load Service Limiters, 12/17/08 IAB, ARC 7409B, NOTICE.

Background. The Utilities Board proposes amendments to rules relating to the use of electric load service limiters for residential customers. According to the board representative, the current rules require updating because of new technology and the ambiguities in the current rules regarding when a service limiter can be used. The winter moratorium rules for disconnection of service would still apply.

Commentary. The board representative indicated that public comments are still being received. The Committee questioned the board representative about the efforts taken to educate the public on the potential use of service limiters and clarified their potential uses, including use during the winter moratorium. According to the board representative, service limiters are currently only available for electricity and not for other utilities like natural gas. The board representative assured the Committee that use of a service limiter would not damage any of the customers' electric appliances and that the customer has the ability to reset the service limiter if the limit is exceeded.

Action. No action taken.

MEMBERSHIP CHANGES: Effective January 12, 2009, Senator Michael Connolly, Senator Jeff Angelo, and Representative Philip Wise retired, and Representative David Jacoby has left the Committee. They are replaced by Senator Wally Horn, Senator Merlin Bartz, Representative Tyler Olson, and Representative Nathan Reichert.

Upcoming Meetings. NOTE: During the legislative session the Committee will meet at 8:00 a.m. on the first Friday of February, March, and April.

The next Committee meeting will be held in Senate Committee Room 116 on **FRIDAY, February 6, 2009**, at 8:00 a.m.

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ADMINISTRATIVE RULES REVIEW COMMITTEE

December 9 and 10, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ENVIRONMENTAL PROTECTION COMMISSION (EPC), Underground Storage Tanks: Monitoring and Remediation, 12/03/08 IAB, ARC 7400B, NOTICE.

Background. These provisions were earlier reviewed in March, May, July, and October; a regulatory analysis was prepared on this filing and a 70-day delay and ultimately a session delay was imposed. The rules established procedures relating to detection, prevention, and correction of releases from underground storage tanks. Opponents contended that costs for required assessments for all newly discovered releases were extremely expensive.

Commentary. This new proposal eliminates those provisions that had been delayed by the Committee. Additionally, the EPC and the Underground Storage Tank (UST) Fund will enter into a Code Chapter 28E agreement to jointly develop and implement a study of the risk to public water supply wells from UST petroleum releases. The study cost will be paid by public funds under the control of the UST Fund. In the event the study reveals an "unreasonable risk" to a well, with some limitations, the UST Fund will provide funding for corrective action. This proposal appears to have the general support of both the stakeholders and ARRC members.

Action. No action taken.

ENVIRONMENTAL PROTECTION COMMISSION, Fee Schedule—Water Use Permit Program, 11/05/08 IAB, ARC 7307B, NOTICE.

Background. 2008 Iowa Acts, chapter 1163 (House File 2672) revised the fee schedule for the water use permit program. Instead of a statutory fee, the program cost is capped at \$500,000 and the EPC is empowered to assess and retain fees up to that limit.

Commentary. Under this proposal the annual permit fee is determined by the costs for administering the water use permitting program for the previous calendar year and on the budget for the next fiscal year; a specific fee was not set in the rules. All users will be assessed the same fee. EPC representatives noted that it would be impracticable to assess fees based on actual usage, citing power plants that use millions of gallons for cooling, but virtually all is returned to the river. Opponents contended this approach places too much of the burden on small irrigators.

Action. No action, additional review is anticipated when the rule is adopted in final form.

ENVIRONMENTAL PROTECTION COMMISSION, Iowa Antidegradation Implementation Procedure, 11/19/08 IAB, ARC 7368B, NOTICE.

Background. Iowa's Water Quality Standards contain a specific policy on antidegradation. This policy protects existing uses of surface waters (e.g., fishing, boating, etc.) and specifies how the department 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."

Commentary. Federal requirements mandate a three-tier approach to antidegradation: Tier 1 designations protect the existing uses of waters; Tier 2 designations for high quality waters allows some degradation under certain conditions but *never* below the level necessary to fully protect the "fishable/swimmable" standard and other existing uses; Tier 3 designations protect outstanding resource waters from any degradation. There are no Tier 3 waters in Iowa.

There are no outstanding resource waters in Iowa; for that reason the EPC proposes a Tier 2 and 1/2, for Iowa outstanding resource waters. EPC representatives stated that Tier 2 and 1/2 is more stringent than for Tier 2, but somewhat less stringent than the prohibition against any lowering of water quality in Tier 3.

These provisions were vigorously opposed by associations representing rural water organizations and Iowa cities. Both contended the restrictions, in conjunction with other water use requirements in various rulemaking actions, would damage growth and economic development in Iowa. The associations also contended that "Tier 2 and 1/2" exceeded federal requirements.

Committee reaction to this proposal was mixed; some members supported the new level of protection while others were concerned about the impact these restrictions might have on small communities. The Committee voted, with Senator Connolly voting no, to request an informal regulatory analysis to estimate the impact this rule would have on the growth and economies of rural communities.

Action. Informal regulatory analysis. This request analysis will not delay final adoption of these rules.

ENVIRONMENTAL PROTECTION COMMISSION, Regulatory Analysis: Wastewater Disposal Systems, 09/10/08 IAB, ARC 7152B, NOTICE.

Background. At its October meeting, the Committee requested an informal analysis concerning these rules. This proposal relates to the location, construction, operation, and maintenance of wastewater disposal systems.

Commentary. The concern over the new provisions is the cost to small communities. Opponents of these rules, representing rural water associations and cities, noted that half of Iowa's cities have a population of 500 or less and the proposal would pose a significant hardship.

Action. No action taken; additional review when the rules are adopted in final form.

HUMAN SERVICES DEPARTMENT, Periodontal Dental Services, 12/03/08 IAB, ARC 7396B, EMERGENCY AFTER NOTICE.

Background. The department restores Medicaid coverage of periodontal and endodontic dental services for Medicaid members 21 years of age or older. This coverage was eliminated in 2002.

Commentary. These provisions were controversial when initially reviewed in October; Committee members had noted that the General Assembly has specifically considered restoring this coverage during the 2008 Session, but has rejected it because of the cost. Members also noted the deteriorating budget situation that has arisen since that earlier decision. Department representatives noted that treatment for these infectious diseases continued to be provided, on a case-by-case basis, as an exception to policy, with an 85 percent rate of approvals. The representatives stated that providing periodontal and endodontic dental services is cost-effective because it can avoid future medical problems and avoid the costs of extractions and dentures.

At the December meeting, discussion continued; department representatives stated that the department would abide by whatever decision Committee members reached. Committee members continued to question the propriety of the department's action, in light of the earlier legislative rejection. At the same time, members agreed that the service is needed and could perhaps, in the long run, avoid higher costs brought on by the failure to treat the disease at an early stage.

Committee members reached a compromise: The rule was allowed to go into effect, but at the same time the issue was referred to the General Assembly to determine whether additional funding could be provided.

Action. General Referral.

PUBLIC HEALTH DEPARTMENT, Smoking Restrictions, 12/03/08 IAB, ARC 7393B, ADOPTED.

Background. These rules were initially implemented on an "emergency" basis in July. Previous Committee reviews occurred in June and October. 2008 Iowa Acts, chapter 1084 (House File 2212) sets out specific restrictions on smoking; essentially prohibiting smoking in any *enclosed* space including places of employment or places of public use; exceptions include tobacco shops, private residences, personal motor vehicles, certain commercial motor vehicles, and the gaming areas of a casino. As part of the overall rulemaking, a stakeholder representing a small business requested a regulatory analysis pursuant to Code Section 17A.4A; that analysis was published in the 09/10/08 IAB.

Commentary. Many comments contended that the statute itself is unfair or unworkable. The most controversial portion of actual rules was the so-called "bar exemption." The legislation prohibits outdoor smoking at the: "[o]utdoor seating or serving areas of restaurants." This prohibition actually works to *allow* smoking in the outdoor seating or serving areas of bars. The rules define a bar as an establishment where only snack foods and prepackaged sandwiches or pizzas are served. No grills or kitchens are allowed. Opponents contend that the department has construed the definition of "bar" too narrowly. The department representatives stated this was the same definition used by the Department of Inspections and Appeals for restaurant inspections and contended that there is no other practical means to provide the exemption with detailed recordkeeping and enforcement requirements. Noting the phrase "seating or serving," department representatives stated that it is possible to establish an outside area where neither food service nor chairs are provided where customers could smoke.

An attorney representing bar owners protested enforcement actions by the Alcoholic Beverages Division to impose license sanctions without a hearing before a judicial magistrate. That attorney contended that the statute specifically provided not for an administrative hearing, but instead a court hearing before a judicial magistrate, thus providing the full panoply of due process protections.

A Committee member moved to object to the definition of a "bar," on the grounds that the definition is unreasonable because it is too narrowly drafted; however, the motion failed.

Action. No action. This was the final review of this rulemaking.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 116 on Friday, January 9, 2009, at 9:00 a.m.

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ADMINISTRATIVE RULES REVIEW COMMITTEE

November 7, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ECONOMIC DEVELOPMENT DEPARTMENT, Targeted Jobs Withholding Tax Credit Program, 10/08/08 IAB, ARC 7248B, NOTICE OF TERMINATION, ARC 7249B, NOTICE.

Background. The department proposes amendments to the targeted jobs withholding tax credit program, which funds a targeted jobs credit in pilot project cities. The credit equals 3 percent of the gross wages paid by the business to the employees in the targeted jobs. The credit is paid to the pilot project city for the payment of debts incurred or assistance provided by the city for urban renewal projects related to the business in the urban renewal area. An earlier version of these rules was reviewed at the Committee's September meeting. Following that review, the department withdrew that rulemaking, made changes based on comments received, and renoticed the rulemaking.

Commentary. The department's representative provided a brief explanation of the program, highlighted the parts of the proposed rules relating to local community matching requirements and award limits, and addressed the potential for lowa communities to compete against one another under this program. The department's rules would require a local community to contribute 10 percent of the amount that the state is expected to contribute and limit the total size of the award to no greater than the company's investment. The statute creating the program does not specifically authorize these provisions; however, the department claims these rules place the program in alignment with other programs administered by the department.

Representatives from several of the affected cities expressed concern that the local matching requirement and award size limitation are beyond the department's statutory authority and expressed support for this controversy to be addressed legislatively. The Committee urged the department to fully consider the concerns of the participating pilot cities and requested written assurance from the department that the proposed policies are not currently being implemented on a case-by-case basis.

Action. No action.

DEPARTMENT OF ECONOMIC DEVELOPMENT. Disaster Relief Programs Update, SPECIAL UPDATE.

Background. Several Committee members requested an update on the status of flood relief efforts managed by the Iowa Department of Economic Development (IDED). The members' concerns centered around the perceived delay in getting funds out into the hands of disaster victims, both homeowners and businesses.

Overview. IDED Director Michael Tramontina provided an overview of IDED's disaster relief programs, with emphasis on how the funds are being distributed to communities and individual disaster victims. The director also explained that while the department has modified certain programs and redirected existing funds to assist in disaster relief, the state does not have specific programs in place to assist in disaster relief, particularly for retail businesses. The director characterized the department's efforts to meet disaster relief needs as "aggressive rulemaking." The director also stated that the rulemaking process was completed as quickly as possible, but with attention to oversight and accountability measures due to the use of taxpayer money. To utilize all possible funding sources, the department compiled and submitted all possible waivers to the appropriate federal agencies, particularly those associated with federal Community Development Block Grant (CDBG) funding.

Jumpstart Program. The Jumpstart Small Business Assistance Program is designed to provide financial assistance to businesses that have sustained physical damage or economic loss due to the disasters. The Jumpstart Housing Assistance Program provides housing repair and rehabilitation, homebuyer assistance, and interim mortgage assistance. According to the director, councils of government (COGs) and six entitlement cities are receiving funds and have the responsibility of distributing those funds to eligible applicants. To date, each COG and entitlement city has received money and are now in the process of taking applications for assistance. The director explained that once those entities exhaust those funds, additional funds will be allocated. Committee members expressed concern that COG decisions are taking too long and that victims' needs are not being met.

Discussion. Committee members requested that the department provide a brief accounting of how much money each COG and entitlement city has received so far. In response to Committee questioning about the application process, the director noted that each assistance application is one page long and is available on the Internet.

EDUCATION DEPARTMENT, Competent Private Instruction and Dual Enrollment, 10/08/08 IAB, ARC 7211B, NOTICE.

Background. The department proposes changes to the rules that give guidance to parents, guardians, and custodians, school boards, and teachers providing or assisting and supervising competent private instruction (CPI) to homeschooled children. The proposed rules set specific dates for filing mandatory reports, clarify rules relating to the provision of

instructional materials, and conform certain rules to changes in federal regulations. The rules also seek to differentiate between the duties of supervising teachers who are privately retained by families and those hired by a school district to provide a home school assistance program. The proposed rules also address content area endorsement requirements and limit teachers who only possess a substitute authorization.

Commentary. The department's representative recognized the concerns of the homeschooling community and assured the Committee that the department would continue to work with those individuals to reach a compromise. Several members of the public, including parents, school district employees, and advocacy groups were in attendance. Most of the concerns centered around limitations placed on the provision of instructional materials and the licensure or authorizations required for certain teachers in a homeschool setting.

The department indicated the need for certain supervising teacher licensing requirements, particularly in situations where a letter grade is provided on a transcript. The department also outlined the permissible use of funds in providing instructional materials. Both the department and members of the regulated community acknowledged that the department is complying with the statute through its CPI mandatory reporting requirements.

Action. No Action.

ENVIRONMENTAL PROTECTION COMMISSION, Maximum Annual Title V Operating Permit Fee, 10/08/08 IAB, ARC 7220B, NOTICE.

Background. The commission proposes to increase the maximum annual Title V operating permit fee on the first 4,000 tons of actual air emissions from the current fixed dollar amount of \$39 per ton to \$62 per ton. Budget projections and estimates of actual air emissions indicate that the annual fee will need to be increased to maintain the current level of service in FY 2009-2010 through FY 2014-2015. The cap was last raised in April 2003.

Commentary. The commission met with members of the public, members of the regulated industry, and environmental groups to obtain preliminary input on raising the maximum fee. Committee members questioned the size of the fee increase, nearly 59 percent. The commission asserts that the data, assumptions, and methodology were determined to be reasonable based on past budget information, available salary contract information, and past actual emissions trends. The fees collected by the commission are used to support regulatory duties. The commission representative informed the Committee that work will continue with interested parties to examine alternate fee scenarios and that a public hearing will be held next week.

Action. No action.

HUMAN SERVICES DEPARTMENT, Periodontal Dental Services, 09/10/08 IAB, 7137B, NOTICE.

Background. The department proposes to restore Medicaid coverage of periodontal and endodontic dental services for members 21 years of age or older. This coverage was eliminated in 2002. This notice was initially reviewed at the Committee's October meeting and was held over for further discussion.

Commentary. Committee members were concerned over the cost of this program, estimated at \$402,000 in FY 2008-2009 and \$817,000 in FY 2009-2010. Noting that the program had been considered during the appropriation process but was not funded, members questioned whether it is appropriate to create a program that would require legislative funding.

Department representatives explained that treatment for these infectious diseases is provided, on a case-by-case basis, as an exception to policy, with an 85 percent approval rating. The representatives stated that providing periodontal and endodontic dental services is cost-effective because it can avoid future medical problems and avoid the costs of extractions and dentures.

Action. No action; further review is anticipated when the rate is adopted in final form.

HUMAN SERVICES DEPARTMENT, Mileage Reimbursement, 09/10/08 IAB, 7122B, and 7125B, EMERGENCY.

Background. The department emergency adopts rules increasing mileage reimbursements for several programs.

Commentary. Committee members were concerned over the increased costs for these reimbursements, and especially the implementation on an emergency basis. Members noted that the mileage increase on Medicaid transportation will impact 75 percent of medical transportation claims, costing \$303,000 in FY 2008-2009 and \$393,000 in FY 2009-2010. The mileage increase for PROMISE JOBS will cost \$488,000 in FY 2008-2009 and \$605,000 in FY 2009-2010. Committee members questioned whether it is appropriate to commit to higher reimbursements when the economic future remains uncertain.

Action. No action; further review is possible.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 116 on Tuesday, December 9 and Wednesday, December 10, 2008, at 9:00 a.m.

LSA Staff: Kathie West, Administrative Code Editor, (515) 281-3355.

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ADMINISTRATIVE RULES REVIEW COMMITTEE

October 14, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ENVIRONMENTAL PROTECTION COMMISSION, Underground Storage Tanks: Monitoring and Remediation, 07/02/08 IAB, ARC 6892B, ADOPTED; 70-Day Delay.

Background. These provisions were also reviewed by the Committee in March, May, and July; a regulatory analysis was prepared on this filing and it is currently subject to a 70-day delay.

Commentary. This filing establishes procedures relating to detection, prevention, and correction of releases from underground storage tanks, including an improved computer model used to predict the movement of groundwater contamination. Using this new model, many sites may be able to cease corrective action or monitoring. This filing also imposes new requirements relating to testing and monitoring near a "sensitive area," which is essentially an area near a public water supply. Opponents contend that costs for a "screening" assessment for all newly discovered releases are extremely expensive.

In July, the Committee imposed a 70-day delay to allow additional discussions between the Environmental Protection Commission (EPC) and the stakeholders. In subsequent discussions, the EPC agreed to a session delay for selected portions of this filing and agreed to seek additional rulemaking from the EPC to resolve the issues.

Action. Session delay on selected portions of this filing, with the remainder allowed to go into effect.

ENVIRONMENTAL PROTECTION COMMISSION, Waste Water Disposal, 09/10/08 IAB, ARC 7152B, NOTICE.

Background. This rulemaking revises several chapters of rules relating to wastewater disposal. Some changes provide additional detail to the National Pollutant Discharge Elimination System (NPDES) permitting process and add three classes of facilities that will be exempted from obtaining operation permits. Other changes relate to prohibited discharges and list pollutants that cannot be discharged to public or private domestic sewage. The proposal also revises and expands monitoring requirements.

Commentary. Commission representatives discussed the main issue for the affected municipalities, which is the potential costs of the new monitoring standards. In response to questions from members of the Committee, Commission representatives explained that the different types of water facilities and population differences account for the difference in monitoring costs between cities. Discussion also centered around what costs are being considered when calculating the cost data. The League of Cities and other represented groups claimed that cities with populations of 500 or less will be most adversely impacted by the new monitoring and testing requirements. Concerns were also raised about the effect additional costs would have on already strained local budgets.

Action. No action, further review is expected at the December meeting.

HUMAN SERVICES DEPARTMENT, Periodontal Dental Services, 09/10/08 IAB, 7137B, NOTICE.

Background. The department proposes to restore Medicaid coverage of periodontal and endodontic dental services for members 21 years of age or older. This coverage was eliminated in 2002.

Commentary. Department representatives noted that treatment for these infectious diseases continued to be provided, on a case-by-case basis, as an exception to policy, with an 85 percent approval rating. The representatives stated that providing periodontal and endodontic dental services is cost-effective because it can avoid future medical problems and avoid the costs of extractions and dentures.

Committee members were concerned over the cost of this program, noting the cost of \$402,000 in FY 2008-2009 and \$817,000 in FY 2009-2010. Committee members also noted that the program had been considered during the appropriation process but was not funded; members questioned whether it was appropriate to create a program that would require legislative funding.

Action. No action, further review is expected at the November meeting.

HUMAN SERVICES DEPARTMENT, Mileage Reimbursement, 09/10/08 IAB, 7122B, and 7125B, EMERGENCY.

Background. The department adopts rules on an emergency basis to increase mileage reimbursements.

Commentary. Committee members were concerned over the increased costs for these reimbursements, especially the implementation on an emergency basis. Members noted that the mileage increase on Medicaid transportation will impact 75 percent of medical transportation claims, costing \$303,000 in FY 2008-2009 and \$393,000 in FY 2009-2010. The mileage increase for PROMISE Jobs will cost \$488,000 in FY 2008-2009 and \$605,000 in FY 2009-2010.

Committee members questioned whether it is appropriate to commit to higher reimbursements when the economic future remains uncertain.

Action. No action. Further review is expected at November meeting.

INSURANCE DIVISION, Annual Audit of Insurers, 09/10/08 IAB, ARC 7124B, NOTICE.

Background. The Division proposes to monitor the financial condition of insurers by requiring an annual audit of financial statements conducted by independent certified public accountants. The rules specify certain insurance companies that would be exempt based on their amount of business. The rules also set out a variety of qualifications for the independent accountant and for the audit itself, which must be conducted in accordance with generally accepted auditing standards.

Commentary. Division representatives informed the Committee that the rules would be in compliance with the federal Sarbanes-Oxley Act of 2002, which established new or enhanced standards for all U.S. public company boards, management, and public accounting firms (but does not apply to privately held companies). The Division also indicated that most of the public comments received have not been regarding the substance of the rules, but instead were more technical in nature. Committee members questioned the Division about the number of insurance companies and audits that would be impacted by the rules, as well as whether the Division is capable of handling the increased workload. Discussion also addressed the broader financial crisis and the oversight currently being provided by the Division.

Action. No action.

NATURAL RESOURCE COMMISSION, Nursery Stock Sales, 09/10/08 IAB, ARC 7145B, NOTICE.

Background. Current Commission rules provide the descriptions of plants made available through the State Nursery, the obligations of customers purchasing plants from the State Nursery, and the prices of such plants. This rulemaking clarifies which customers must meet the obligations enumerated in the rules, provides for the sale of additional plants, and amends the prices of plants made available for sale.

Commentary. The Committee questioned whether the proposed rules would create a situation where the State Nursery would be in direct competition with privately owned tree farms. The Commission representative stated that some commission members believe that the new rules would be a benefit to private nurseries by allowing them to purchase and resell the State Nursery's stock. Private nursery owners claim that the rulemaking would effectively make the State Nursery a wholesaler. The Commission representative explained that the State Nursery operates based on cost and not in a for-profit manner, and that the limitations on who may purchase directly does not put the State Nursery in direct competition with private nurseries.

Action. No action.

PUBLIC HEALTH DEPARTMENT, Smoking Restrictions, 07/30/08 IAB, 6989B, EMERGENCY.

Background. 2008 Iowa Acts, House File 2212 sets out specific restrictions on tobacco smoke, essentially prohibiting smoking in any *enclosed* space including places of employment or places of public use; exceptions include tobacco shops, private residences, personal motor vehicles, certain commercial motor vehicles, and the gaming area of a casino. As part of the overall rulemaking, a stakeholder requested a small business regulatory analysis pursuant to Iowa Code Section 17A.4A; that analysis was published in the 09/10/08 IAB.

These provisions were subject to an extensive rulemaking. The initial draft was posted on June 3 on a special Internet website: <http://www.iowasmokefreeair.gov/>. That website also contains the text of the statute, a frequently asked questions section, and comment box soliciting questions and comments. Public hearings were held around the state and hundreds of comments were received. An initial review of the emergency filing was held at the Committee's June 2008 meeting.

Commentary. The most controversial portion of these rules is the so-called bar exemption. Section 3(2)(b) of the Act prohibits outdoor smoking in the "[o]utdoor seating or serving areas of restaurants." This prohibition actually works to *allow* smoking in the outdoor seating or serving areas of bars. Opponents of the rules contend that the Department has construed the definition of bar too narrowly. The proposed rules define a bar as an establishment where only snack foods and prepackaged sandwiches or pizzas are served. No grills or kitchens are allowed. The Department contends that there is no other practical means to provide the exemption without detailed recordkeeping and enforcement requirements. Department representatives noted that it was possible to establish an outside area where neither food service nor chairs are provided, where customers could go to smoke.

Opponents also protested that the smoking ban does not extend to the casino floors or the state fair. Committee members agreed this is an issue that should be addressed through the courts.

Comments were also received on the regulatory analysis performed by the Department. That analysis, citing several studies, concluded that the smoking restrictions would not negatively affect restaurant or tavern business. Bar owners informed the Committee that business has dropped 30 percent in some cases.

Bar owners also protested enforcement actions by the Alcoholic Beverages Division to impose license sanctions without a hearing before a judicial magistrate. Department representatives noted that licensing agencies have authority, independent of the Department, to take action under the Act.

Committee members noted that many of the expressed concerns related to the statute, not the rules, and were beyond the jurisdiction of the Committee. Members stated that the emergency rules would be replaced by the adoption of the notice of intended action and that the Committee would conduct additional review on that final rule.

Action. Additional review is expected in December 2008.

PUBLIC HEALTH DEPARTMENT, Dental Services—Oral Health, 07/30/08 IAB, ARC 7023B, Filed; 70-Day Delay.

Background. These rules were reviewed by the Committee in August 2008. At issue in this filing was the definition of "dental home," defined in the rules as:

"Dental home" means a network of dental and nondental [emphasis added] public and private health care professionals providing individualized care based on risk assessment. Services include dental screenings, preventive services, oral health education, and referrals to dentists for definitive evaluation and treatment.

Commentary. The Iowa Dental Association expressed concern about the possibility of nondental professionals performing dental treatment under these rules. Department representatives stated that the rules do not change the scope of practice for specific medical professionals and that the roles of each dental and nondental professional in the program will be dictated by their scope of practice and that dental treatment would be conducted by the appropriate person.

In August 2008, the Committee imposed a 70-day delay on the rules, requesting that the Department and the stakeholders meet to resolve this issue. Those meetings failed to reach a consensus and the Committee imposed a session delay only on that portion of the filing which defined dental home; the remaining rules will go into effect.

Action. Session delay on definition of dental home.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 116 on Friday, November 7, 2008, at 8:30 a.m.

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Internet Page: <http://www.legis.state.ia.us/asp/Committees/Committee.aspx?id=53>.

ADMINISTRATIVE RULES REVIEW COMMITTEE

September 9, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ECONOMIC DEVELOPMENT DEPARTMENT, Targeted Jobs Withholding Tax Credit Program, 08/13/08 IAB, 7068B, NOTICE.

Background. The Targeted Jobs Withholding Tax Credit Program was created in 2006 to fund a targeted jobs credit in pilot project cities designated by the department. The credit equals 3 percent of the gross wages paid by the participating business. The credit is paid to the pilot project city for the payment of debts incurred or assistance provided by the city for urban renewal projects related to the business in the urban renewal area.

Commentary. Department representatives stated that the administration of this tax credit program was difficult, since the department's role is largely limited to the review and approval between local businesses and the local taxing authority.

The current rules require a simple dollar-for-dollar matching requirement, common to many department programs; the published notice created a more complex requirement, and subsequent to the publication of the notice of intended action, the department circulated re-drafts of that notice relating to local match requirements, which would significantly alter the initial proposal as published. Committee members expressed concern that these changes would be incorporated into the final adopted rule without additional opportunity for public comment. Department representatives stated that the notice would be terminated and the new language would be presented in a new rulemaking.

Committee members also questioned whether the local match requirements set out in the proposal are already being applied on a case-by-case basis. Noting that the program was implemented as a series of pilot projects, department representatives responded that match requirements were negotiated on a case-by-case basis that were the equivalent of the Iowa Code Ch. 427B abatement requirements.

Action. No action taken.

ECONOMIC DEVELOPMENT DEPARTMENT, Renewable Fuels Infrastructure, 08/13/08 IAB, 7074B, NOTICE.

Background. The Department of Economic Development proposes a number of revisions to the renewable fuels infrastructure program based on the enactment of 2008 Iowa Acts, H.F. 2689. The Act provides program coverage to infrastructure at retail sites and expands coverage to include so-called blender pumps which mix types of motor fuel and may allow individual selection of the percent of either ethanol or biodiesel.

Commentary. Following a brief discussion of the proposed rules, Committee members expressed frustration about the lack of E-85 fueling sites in the state and questioned why there are not more applications to participate in the program. Members noted that particularly Wisconsin and Minnesota have more E-85 sites. The members requested that the department review surrounding states and determine why other programs appear to be more successful than Iowa's

program.

Action. No action taken.

INSURANCE DIVISION, Pharmacy Benefit Managers, 08/13/08 IAB, 7082B, ADOPTED.

Background. Code Supplement Ch. 510B regulates pharmacy benefits managers; these managers coordinate the policy benefit between the insured, the pharmacy provider network, and the insurer. Rulemaking initially began in January, 2008; with a re-notice published in May.

Commentary. Representatives of a benefit manager organization protested several portions of this filing. Under these rules a "clean claim" must be paid within 20 days after electronic receipt or within 30 days after receipt in paper format. The representatives contended that only a few states have such a short timeframe requirement and that it would add to the cost of doing business; they suggested that a better approach would be to heavily penalize managers who failed to meet a 30-day deadline. Committee members, however, offered general support for the 20-day requirement. Representatives of the pharmacists association voiced support for these rules, contending that the agreements with benefit managers are not negotiated, but instead are adherence contracts offered on a take-it-or-leave-it basis.

The benefit manager representatives also expressed concern about the auditing procedures set out in the rules. They requested that pending the outcome of fraud investigations that total payments to a pharmacy be limited to \$25,000, in order to limit the potential loss. Noting that initially the division itself was to provide the required review, the representatives also raised several questions concerning the independent third-party review process: who pays for the cost of the review; how long will the review process last; may the parties be represented by legal representatives; is the decision binding; how is the third party selected; and how will the venue for the review be determined? Division representatives responded that these issues had not been discussed earlier.

Committee members expressed some concern about third-party audits and requested that the division and the stakeholders meet over the next 30 days to resolve these issues.

Action. 70-day delay, subrules 59.6(3), 59.6(5) and 59.7(6). Additional review is scheduled for October 14, 2008.

TRANSPORTATION DEPARTMENT, Contractual Limitation of Vendor Liability Provisions, 06/04/08 IAB, 6809B, NOTICE.

Background. Code Supplement §327F.13, enacted in 2007, requires the owner of a railroad track to 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 riding the side of a train.

Commentary. The department's proposal defines the term "close clearance" and sets out placement and dimension requirements for the required warning device. A representative of the United Transportation Union commented this is 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 provides authority to regulate the size and placement of these signs.

Committee members urged the department to discuss this issue with the union representative and determine whether any additional regulation would be lawful.

Action. No action taken.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 116 on Tuesday, October 14, 2008, at 8:30 a.m., with a second day possible. The agenda will include consideration of rules applying smoking restrictions, published by the Department of Public Health as Notice ARC 6990B, and Filed Emergency ARC 6989B; **07/30/08 IAC**.

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ADMINISTRATIVE RULES REVIEW COMMITTEE

August 12, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ADMINISTRATIVE SERVICES DEPARTMENT, Contractual Limitation of Vendor Liability Provisions, 06/04/08 IAB, 6809B, NOTICE.

Background. Code Section 8A.311(21) requires the Department of Administrative Services (DAS) to establish a policy for determining when limitation of vendor liability may be acceptable in state procurements for goods and services. These proposed rules apply only to information technology procurements by DAS or on behalf of another state agency. Following the enactment of this legislation, DAS commissioned a report, "Limitation on Liability in Iowa IT Contracting,"

which analyzed various aspects of vendor liability.

The enabling legislation prohibits any limitation on liability for intentional torts, criminal acts, or fraudulent conduct. The rules specify certain other obligations or damages that cannot be limited. The proposed rules would in most cases limit vendor liability to two times the amount of the contract. However, the rules also provide discretion to negotiate limited vendor liability. The rules' criteria for allowing limited liability are the same as set out in the statute, with the addition of a section dealing with special circumstances. These are circumstances where the risk to the state is so significant that the statutory criteria are "not appropriate."

Commentary. Review of this rulemaking was held over from the Committee's July meeting. DAS provided an illustrative example of how the proposed rules would apply to a hypothetical procurement situation. Committee members were introduced to the newly hired risk manager, employed in the Department of Management. DAS indicated that very little progress has occurred since the Committee's last meeting and that the parties have been unable to reach a compromise.

Representatives of the information technology industry stated that the proposed rules were not similar to the "California model" due to the number of exceptions and that DAS would be able to continue its current procurement policies under the proposed rules. Industry representatives also indicated that the inability of the state to provide detailed risk assessments dissuades vendors from doing business with the state. Other vendor representatives commented that the provisions should not be limited to information technology purchases.

Committee members expressed a variety of opinions; some members supporting the filing as a good first step, while others believed the current provisions are inadequate and should be expanded. Members continued to urge DAS and the interested parties to work together to reach a compromise.

Action. No action taken.

ENVIRONMENTAL PROTECTION COMMISSION, Quorum Requirement, 07/02/08 IAB, 6921B, EMERGENCY.

Background. Commission rules required an affirmative vote of five members to pass any measure. For over seven months commission operations had been hampered by two vacancies; there were only seven sitting members on the board. In June, the commission resolved this issue by emergency, adopting a procedural rule that allowed a measure to be adopted by four votes when only seven members are appointed. Iowa Code §455A.6(5) states: "*5. A majority of the members of the commission is a quorum, and a majority of a quorum may act in any matter within the jurisdiction of the commission, unless a more restrictive rule is adopted by the commission.*"

Commentary. The substance of this rule is supported by statutory authority, but the "emergency" filing was questioned by Committee members. The commission defended the emergency filing, stating that the previous voting requirement resulted in delayed agency action, gridlock, and stalemate, with the minority at times deciding an issue. The commission asserted that the conditions created by the previous rule fulfilled the statutory requirements for emergency rulemaking. A representative from the Attorney General's Office reiterated the Attorney General's position from the Committee's last meeting that adequate grounds for emergency rulemaking do not exist, specifically noting that 95 percent of the commission's votes would have been unaffected by this rule.

Committee members noted their general opposition to the use of emergency rulemaking, and in particular commented that emergency rulemaking is not appropriate in this situation. Committee members also discussed how this change in the voting rules might affect the Governor's expediency in filling vacant positions on the commission. Committee members also expressed concern with the commission's failure to proceed pursuant to the advice of the Attorney General's Office and the Department of Natural Resources legal counsel.

Action. An objection was approved by the Committee. Discussion indicated that the objection related only to the use of the emergency rulemaking procedures, not to the substance of the rule itself. The effect of this objection is to terminate the emergency filing 180 days after the date of the objection (August 12, 2008).

NURSING BOARD, Administration of Anesthetic Agents — Requirements and Exceptions, 06/30/08 IAB, ARC 7009B, NOTICE.

Background. These proposed amendments to the minimum standards of nursing practice prohibit a registered nurse (RN) and an advanced registered nurse practitioner (ARNP), with the exception of a certified registered nurse anesthetist (CRNA), from administering anesthetic agents (e.g., Propofol, Brevitol, Ketamine, and Etomidate), during any operative, invasive, or diagnostic procedure in any type of setting. These amendments set forth exceptions and requirements which allow a RN and an ARNP to administer anesthetic agents, including required certifications and annual education in the administration of anesthetic agents.

Commentary. The board indicated that this rulemaking is the result of questions raised regarding the education of nurses in administering these drugs. Interested parties, including the Iowa Hospital Association, raised concerns over the recognition of certain education options for nurses, stressed the impracticability of the rule's prohibitions, and warned against potential delays in the administration of needed pain medications. The interested parties also indicated that the drugs should be addressed individually rather than as a group and informed the Committee that they will continue to work with the board in developing the rules. A public hearing is set for September 10, 2008.

Action. No action taken.

PUBLIC HEALTH DEPARTMENT, Oral Health, 07/30/08 IAB, ARC 7023B, FILED.

Background. These rules describe the purpose and responsibilities of the State Dental Director and the Oral Health Bureau as established in Code Chapter 135. The new bureau will administer a variety of federal, state, and local initiatives. The I-Smile Program requires that every recipient of Medicaid who is a child 12 years of age or younger shall have a designated dental home and shall be provided with the dental screenings and preventive care identified in the oral health standards under the Early and Periodic Screening, Diagnostic, and Treatment Program under Medicaid.

In response to comments received during the public comment period from the Iowa Dental Association (IDA), a modification was made to the definition of "dental home," which now includes "diagnostic services, treatment services, and emergency services" to more closely reflect the dental home definition adopted by the Iowa Legislature in 2008. The listed providers in the definition were not changed because the dental screening statute allows for both dental and nondental health care professionals.

Commentary. Committee members questioned the department about the possibility of nondental professionals performing dental treatment under these rules. The department indicated that rules do not change the scope of practice for specific medical professionals, only the overall position of the department in promoting oral health.

IDA representatives addressed the Committee and requested a 70-day delay. IDA expressed support for the concept of the "dental home," but requested additional language that details the persons authorized to conduct certain screening and treatment functions. The department explained that the roles of each dental and nondental professional in the program will be dictated by their scope of practice and that dental treatment would be conducted by the appropriate person. The Committee imposed a 70-day delay on the rules.

Action. A 70-day delay was approved.

PUBLIC SAFETY DEPARTMENT, Inventory of Impounded Vehicles Under Emergency Conditions, 06/30/08 IAB, ARC 6999B, NOTICE, ARC 6986B, FILED EMERGENCY.

Background. Through this rulemaking, the department amends its impounded vehicle inventory search policy required under the U.S. Supreme Court's decision in *Florida v. Wells*, 495 U.S. 1 (1990). The department's required written policy requires officers to conduct an inventory within 24 hours of impoundment of any vehicle. This amendment would allow for the 24-hour period to be extended in certain situations, including if the inventory search is rendered impracticable by road or weather conditions or by the volume of impounded vehicles requiring processing during a limited period of time. This amendment, filed as an emergency rulemaking, became effective July 1, 2008.

Commentary. The department indicated that the amendment creates an alternative only in emergency situations and would not affect the normal inventory search procedure. In response to Committee questioning, the department also argued that this amendment would not affect individuals' property rights. Several Committee members questioned whether the emergency rulemaking process was needed for this amendment and cautioned the department on the use of emergency rulemaking.

Action. No action taken.

SECRETARY OF STATE, Revenue Purpose Statement Ballots, 06/30/08 IAB, ARC 6992B, FILED EMERGENCY, ARC 6991B, NOTICE.

Background. These rules are in response to the enactment of 2008 Iowa Acts, H.F. 2663, the relevant portions of which repealed the requirements for elections to approve or disapprove imposition of or changes in the local option sales and services tax for school infrastructure purposes (SILO). The local option tax has been replaced with a statewide penny sales tax that will be used for similar purposes. The new law requires that elections be held to extend or amend previously adopted revenue purpose statements that specify the uses of this sales tax revenue. This amendment rescinds the obsolete rule regarding SILO elections and replaces it with a rule that sets forth the form of ballot to be used whenever the adoption, amendment, or extension of a revenue purpose statement is proposed. The rules require the text of both the current and the proposed revenue statements be placed on the ballot when the ballot initiative involves a proposed amendment to the revenue purpose statement.

Commentary. The Secretary of State emphasized that the contentious portion of the rules would only apply in situations where the old revenue purpose statement is being amended and would only apply to three school district elections during the upcoming school elections. The Iowa Association of School Boards expressed confusion regarding the difference between an "amended" revenue purpose statement and a "new" revenue purpose statement. The confusion was noted primarily in situations where a school district includes multiple counties, each of which had its own previous revenue purpose statements.

Committee members also asked for clarification regarding the Secretary of State's statutory authority for requiring both revenue purpose statements to be on the ballot and asked that a representative for the county auditors be present at the Committee's September meeting.

Action. No action taken.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 116 on Tuesday, September 9, 2008, at 8:30 a.m. The agenda will include review of smoking restrictions, published by the Department of Public Health

as Notice ARC 6990B, and Filed Emergency ARC 6989B; 7/30/08 IAC.

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Internet Page: <http://www.legis.state.ia.us/asp/Committees/Committee.aspx?id=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

July 8, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ADMINISTRATIVE SERVICES DEPARTMENT, Contractual Limitation of Vendor Liability Provisions, 06/04/08 IAB, 6809B, NOTICE.

Background. Code section 8A.311(21) requires the Department of Administrative Services (DAS) to establish a policy for determining when limitation of vendor liability may be acceptable in state procurements for goods and services. These proposed rules apply only to information technology procurements by DAS or on behalf of another state agency. Following the enactment of this legislation, DAS commissioned a report, "Limitation on Liability in Iowa IT Contracting," which analyzed various aspects of vendor liability.

The enabling legislation prohibits any limitation on liability for intentional torts, criminal acts, or fraudulent conduct. The rules specify certain other obligations or damages that cannot be limited. The proposed rules would in most cases limit vendor liability to two times the amount of the contract. However, the rules also provide discretion to negotiate limited vendor liability. The rules' criteria for allowing limited liability are the same as set out in the statute, with the addition of a section dealing with special circumstances. These are circumstances where the risk to the state is so significant that the statutory criteria are "not appropriate."

Commentary. DAS cited its outreach to the vendor community during the rulemaking process and noted that 20 vendors attended its first meeting. DAS also discussed with Committee members its work with an outside consultant to review the issue and to look at the approaches employed by other states.

The rules were described as a "balance" of all parties' interests and were patterned after California's rules, which are viewed by vendors as a successful approach. DAS decided to only apply the rules to acquisitions of information technology goods and services because there have not been other types of vendors presenting similar unknown liability issues. Representatives of the information technology industry stated that the noticed rules are a step in the right direction, but that they hope for certain changes in the rules before they are adopted in final form.

Action. No action taken, additional review August 12, 2008, meeting.

EDUCATION DEPARTMENT, Use of Restraints, Physical Confinement or Detention, 06/18/08 IAB, 6838B, NOTICE.

Background. The Department proposes to amend rules relating to the state's general statutory ban on corporal punishment and the exceptions. The proposed rules state that physical restraint and physical confinement or detention shall not be used as discipline for minor infractions and may be used only after other disciplinary techniques have been attempted, if reasonable under the circumstances. Only school employees who have received training may utilize physical restraint, physical confinement, or detention.

The proposed rules explain that the area of confinement and period of confinement shall be of reasonable dimensions, considering the age, size, and physical and mental condition of the student subject to confinement or detention, and shall be free from hazards and dangerous objects or instruments. The proposed rules also require parental notification of confinement policies and documentation of all instances in which confinement is used.

Commentary. Department representatives explained to the Committee that this rulemaking is the result of a larger national issue and not the result of a specific incident within the state. The rules were developed after consulting the rules of neighboring states and reviewing the relevant empirical research.

It was emphasized that reasonableness is still the standard for the use of restraint or confinement and that only trained school employees may engage in the use of such techniques. Committee members questioned whether schools will utilize local law enforcement in certain situations to control children and whether parental notification requirements are contained within the proposed rules. Committee members also questioned the nexus between the use of confinement or restraints and evaluation of a child's mental health. Committee members expressed some concern over the use of the term "detention," whether this rulemaking applies to school volunteers, and whether area education agencies have the capacity to provide training.

A representative of the Iowa School Nurse Organization expressed the group's disappointment in not being consulted in the development of these rules and believes the Department is missing a chance to utilize the experience of certain school professionals.

Action. No action taken.

ENVIRONMENTAL PROTECTION COMMISSION (EPC), Quorum Requirement, 07/02/08 IAB, 6921B, EMERGENCY.

Background. Commission rules required an affirmative vote of five members to pass any measure. For over seven months Commission operations had been hampered by two vacancies—there were only seven sitting members on the board. In June the Commission resolved this issue by emergency, adopting a procedural rule that allowed a measure to be adopted by four votes when only seven members are appointed.

Iowa Code §455A.6 states: "5. A majority of the members of the commission is a quorum, and a majority of a quorum may act in any matter within the jurisdiction of the commission, unless a more restrictive rule is adopted by the commission."

Commentary. The substance of this rule was supported by statutory authority, but the "emergency" filing was vigorously disputed by Committee members. A Commission representative defended the emergency filing stating that the previous voting requirement "resulted in delayed agency action, gridlock, and stalemate, with the minority at times deciding an issue." A representative from the Attorney General's Office, speaking only on the question of rulemaking procedure, stated that adequate grounds for emergency rulemaking do not exist.

Committee members noted their general opposition to the use of emergency rulemaking, and in particular commented that emergency rulemaking is not appropriate in this situation. The members determined that it would be best to speak directly with Commission members to get a better understanding of the problems that resulted in this emergency filing.

Action. No action taken, additional review August 12, 2008, meeting.

ENVIRONMENTAL PROTECTION COMMISSION, Underground Storage Tanks: Monitoring and Remediation, 07/02/08 IAB, ARC 6892B, ADOPTED.

Background. These provisions have earlier been reviewed in March and in May, when an informal regulatory analysis was requested. Commission rules establish procedures relating to detection, prevention, and correction of releases from underground storage tanks. After over 10 years of experience it has been determined that the computer model used to predict the movement of groundwater contamination overestimated that movement, resulting in unnecessary expense for the cleanup of contamination that posed no threat to the public. This filing updates and improves this model, with the result that many sites may be able to cease corrective action or monitoring. This filing also imposes new requirements relating to testing and monitoring near a "sensitive area," which is essentially an area near a public water supply.

Commentary. All stakeholders supported the adoption of the new computer model, noting that its improved accuracy will save cleanup costs. The rulemaking generally was supported by representatives of public water supplies. Opponents included petroleum marketers and storage tank insurance interests. The opponents contended that costs for a "screening" assessment for all newly discovered releases was \$2,000 per site, and an estimated assessment and modeling expense was \$100,000 at 20 percent of all new release sites each year. The EPC representatives stated that the rules had been developed with the full participation of the stakeholders. The representatives also questioned the accuracy of the cost estimates.

Committee members did not criticize the rule, but did feel that its implementation should be temporarily delayed to allow additional discussions between the EPC and the stakeholders. The members noted that the delay did not imply support for any additional delay in the future.

Action. Seventy-day delay, additional review in September.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 116 on Tuesday, August 12, 2008, at 9:00 a.m.

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ADMINISTRATIVE RULES REVIEW COMMITTEE

June 11, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ELDER AFFAIRS DEPARTMENT, Resident Advocate Committees, 05/07/08 IAB, 6789B, NOTICE.

Background. The Department proposes to amend rules relating to the organization and operation of resident advocate committees required by Code Section 135C.25. Resident advocate committees represent and advocate for the rights of residents of a nursing home or other health care facility and investigate complaints and grievances. Under the proposal, the resident advocate committee should "[s]eek to resolve the complaint or grievance and, if feasible, prevent unnecessary regulatory action against a facility. However, the committee shall not prevent or dissuade regulatory action when necessary to protect or achieve the rights of residents." The proposed rules also address rules relating to termination and training.

Commentary. Department representatives indicated that the applicable rules have remained unchanged for many years and need to be revised. Committee members questioned the ability of an individual to serve as a resident advocate for multiple facilities and expressed concerns over the role advocates undertake as inspectors. Specifically, concerns were raised regarding the level of training for volunteers in the areas of investigation and complex state and federal regulations. The Department indicated that one current provision which allows a resident advocate committee to conduct certain investigations needs to be changed.

Action. No action taken.

ENVIRONMENTAL PROTECTION COMMISSION (EPC), Surface Water Classifications, 05/07/08 IAB, 6782B, FILED.

Background. The federal Clean Water Act established a goal that perennial streams and pools be "fishable/swimmable." Every state is required to have water quality standards which meet this federal requirement and are approved by the federal Environmental Protection Agency. To implement this requirement, the EPC promulgated rules which designate some 26,000 perennial streams and intermittent streams with perennial pools as Class A1, B(WW-1) protected waters; this is the highest designation, protecting the stream for recreational and aquatic life uses.

Subsequent 2006 state legislation required the EPC to designate stream segments pursuant to designated uses, e.g., agriculture, aquatic, or recreational use. The EPC has begun a series of rulemaking proceedings to establish a specific designation for each Iowa stream, which is determined after a field study is conducted using specific criteria. As specific designations are established, effluents from treatment facilities must be reduced to meet the assigned level.

Commentary. Committee members requested a brief description of each classification. EPC representatives explained that the evaluation protocol was first created through the rulemaking process prior to its implementation through individual stream designations. Public hearings were held and over 2,000 public comments were received regarding the designation process. Forty-seven of the original recommendations were changed after receiving public comment. Committee members also inquired as to the potential for certain wetlands to be included in the EPC's designations.

Action. No action taken.

INSURANCE DIVISION, Pharmacy Benefits Managers, 05/07/08 IAB, 6781B, NOTICE.

Background. This rulemaking implements 2007 Iowa Acts, S.F. 512 (ch. 193), which regulates pharmacy benefits managers; these individuals administer or manage prescription drug benefits provided by a insurer, health benefit plan, health maintenance organization, or similar third-party payor program. The proposed rules establish standards for timely payment of claims, penalties for noncompliance, and a resolution process for complaints and disputes.

Under the proposal, a "clean claim" (i.e., a claim that requires no further information) shall be paid as soon as feasible but within 20 days after receipt of a clean claim when the claim is submitted electronically and shall be paid within 30 days after receipt of a clean claim when the claim is submitted in paper format. If the claim is not timely paid, the manager must pay the pharmacy or pharmacist interest at the rate of 10 percent per annum.

Commentary. A Division representative explained that the timely payment of claims issue is one of the most contentious issues within the rulemaking. The Iowa Pharmacy Association expressed support for the 20-day requirement relating to electronic "clean claims," but also favors exploring the possibility of reducing that period to 15 days. Committee members were informed that four other states have adopted a 15-day reimbursement period for such claims and the proposed rules include a provision which directs the Insurance Commissioner to study a 15-day reimbursement period.

Action. No action taken.

PUBLIC HEALTH DEPARTMENT, Restrictions on Public Smoking, H.F. 2212, INFORMAL REVIEW.

Background. 2008 Iowa Acts, H.F. 2212, sets out specific restrictions on tobacco smoking; essentially prohibiting smoking in any *enclosed* space including places of employment or places of public use; exceptions include tobacco shops, private residences, personal motor vehicles, certain commercial motor vehicles, and the gaming area of a casino.

The Act goes into effect on July 1, 2008, and the Department of Public Health has determined that rules implementing the new law must be in effect on that date. Following extensive research and discussion, the Department presented a draft of the rules for informal Committee discussion at the June 11 meeting. The Board of Health intended to adopt emergency rules later that same day; however, due to flooding concerns, that adoption did not occur.

The initial draft was posted on June 3 on a special internet web site: <http://www.iowasmokefreeair.gov/>. That web site also contains the text of the statute, a frequently asked questions section, and comment box soliciting questions and comments. Public hearings will be held around the state.

Commentary. Department representatives noted that H.F. 2212 was signed by the Governor on April 15, 2008, and the Department immediately began the drafting process by reviewing similar restrictions in other states and convening stakeholder meetings. By the time a rules draft was published on the Department's web site, some 300 comments had already been received.

There was significant public discussion concerning these rules, primarily relating to smoking in the outside areas around taverns. Under section 3 of the Act, "[s]moking is prohibited and a person shall not smoke" in the outdoor seating or serving areas of restaurants. This provision, by its own terms, would not apply to the outdoor seating or serving areas of bars. In section 2 of the Act, a bar was specifically defined as a place in which the serving of food is only incidental to the consumption of alcoholic beverages. Under the proposed rules, incidental food service is limited to ice, prepackaged

snacks, popcorn, peanuts, and the reheating of commercially prepared foods. This definition is based on language used by the Department of Inspections and Appeals relating to restaurant inspection.

Bar operators protested this definition, contending that during the legislative process they were assured that outdoor smoking at bars was protected. They further stated that the percentage of business from food sales is very small and that using percentage as a basis of the definition of bar is the appropriate measure. Department representatives stated that in other states use of percentages was problematical and they further noted that use of a percentage would greatly expand the availability of the exemption. Committee members supported the position of the bar operators, contending that legislators understood that generally speaking the outdoor areas of a bar were not going to be subject to the smoking ban. Members urged the Department to revise the definition to exclude bars that provided a limited food service.

A second issue involved the 24 square inch signage requirements in the rule; comments suggested the size was too large for motor vehicles and that schools already had alternative no-smoking signs posted.

Action. This proposal was reviewed for informational purposes only, since it had neither been filed nor published, the Committee took no formal action. The Committee will formally review this filing, probably in August, following the closure of the public comment period on August 6, 2008.

PUBLIC SAFETY, Closed Circuit Surveillance Systems, 02/13/08 IAB, 6591B, 70-Day Delay.

Background. Currently, gambling activities on excursion gambling boats and at racetracks must be continuously recorded and Department rules implementing that requirement mandate the use of a closed circuit surveillance system. This rulemaking completes action on a number of revisions including expanding the rules to all gambling structures, requiring all facilities to have digital recording systems by 2011, and requiring a closed network with limited access. Additionally, all equipment used to monitor or record views obtained by a surveillance system must also be located in a room on the same premises as the casino or adjacent property, and be used exclusively for casino surveillance security purposes. The casino is also required to develop policies designating employee access and the transmission or release of live or recorded images, video, or audio. The Committee imposed a 70-day delay on the rulemaking during its March 2008 meeting.

Commentary. A Department representative described the negotiations and communication with interested parties since the Committee imposed a 70-day delay. The Department believes good-faith efforts have been made to reach a compromise, but acknowledged that disagreement remains with industry groups. An industry group requested a declaratory order from the Department regarding some of the proposed rules. However, according to the Department, the request would have involved legal opinions; therefore, the Department was unable to comply with the request. Mr. Wes Ehrecke, of the Iowa Gaming Association, cited concerns over certain definitions, provisions providing access to surveillance systems by Department of Criminal Investigation, whether the Department has jurisdiction to enact these rules, and also requested a session delay.

Action. Session delay.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 22 on Tuesday, July 8, 2008, at 9:00 a.m.

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Internet Page: <http://www.legis.state.ia.us/asp/Committees/Committee.aspx?id=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

May 13, 2008

Chairperson: Senator Michael Connolly

Vice Chairperson: Representative Philip Wise

ENVIRONMENTAL PROTECTION COMMISSION, Application of Liquid Manure on Soybeans, 04/09/08 IAB, 6704B, ADOPTED.

Background. These provisions were originally noticed in January 2007; a regulatory analysis statement was requested and published in September 2007. The statement provided that the limitation would impact larger producers who would be forced to find new fields to apply the waste, and transporters who would be forced to truck the waste longer distances. The statement did not estimate to what extent the limitation would reduce the level of nitrates in surface waters. At the October 2007 Committee meeting, department representatives stated that soybeans are capable of producing their own nitrogen and the rule's 100-pound limit approximates the amount of nitrogen that can be utilized by a soybean.

These rules apply only to feeding operations that are required to submit manure/nutrient management plans, and limit the application of liquid manure, processed wastewater, or settled open feedlot effluent to 100 pounds of available nitrogen per acre. The restriction applies only to land that is planted to soybeans or that will be planted to soybeans the next crop season. Effective May 14, 2013, land applications are prohibited unless the Commission determines that available

scientific evidence justifies alternative action. The prohibition will not become effective unless the Commission publishes a notice in the Iowa Administrative Bulletin confirming that it has reviewed the available scientific evidence and that the prohibition shall take effect on May 14, 2013.

Commentary. Department representatives explained this rulemaking originated with the Environmental Protection Commission itself. Commission members were concerned about excessive nitrogen runoff. The representatives noted that the limitations do not apply to applications on corn fields or the application of solid waste. The representatives emphasized that before the ban can take place a study of available scientific evidence will be conducted and that prior to final implementation, notice will be published in the Iowa Administrative Bulletin.

In response to questions from Committee members, department representatives stated they had received over 1,000 public comments with a variety of opinions. The representatives conceded that the application of commercial nitrogen poses a greater threat to the public health, but they noted they do not have legal authority to regulate the application of commercial fertilizer.

Action. No action taken.

ENVIRONMENTAL PROTECTION COMMISSION, Monitoring and Cleanup, Underground Storage Tanks, Regulatory Analysis, SPECIAL REVIEW.

Background. The Environmental Protection Commission (EPC) published a notice of intended action in February rewriting existing provisions relating to detection, prevention, and correction of releases from underground storage tanks. Under the program, EPC utilizes "risk-based corrective action" to evaluate the risks and determine the appropriate response when a site has been contaminated. The process sets out a site-specific, three-tiered approach to site assessment and analysis. The program has not been updated in a decade and it has been determined that the computer model used to predict the movement of groundwater contamination overestimated that movement. This resulted in unnecessary expense for the cleanup of contamination that posed no threat to the public. This proposal updates and improves this model, with the result that many sites may be able to cease corrective action or monitoring.

Opponents of this revision contend the requirements would be very expensive with no real benefit to the public health. Committee members questioned the cost of these new requirements and asked for an *informal* regulatory analysis to estimate these costs.

Commentary. Department representatives stated that, in preparing the analysis, it conducted seven meetings for stakeholder and public input using a "core stakeholder group." The recalibration of the computer model significantly shrinks the modeled plume size. However, the analysis states that the model does not sufficiently evaluate the vertical movement of the plume and the influence of pumping wells. For that reason, the new rules have a special procedure in addition to the new model for evaluating the risk to public water supply wells when the wells fall outside the modeled plume. Public comment supported the use of the new computer model, but reaction was mixed concerning the additional assessment and monitoring requirements, with insurance and industry representatives opposing the new risk-based corrective action (RBCA) assessment process while water agencies support the process. Opponents remain concerned over the cost of assessing the risk to these wells, while department representatives respond that once a well is contaminated, the only real alternative is to drill a new well, at great cost.

Action. This review was an interim step relating to the informal regulatory analysis; additional review will take place when the rules are adopted in final form by the EPC. The additional review is likely to occur in July.

INSPECTIONS AND APPEALS, Health Care Facilities: Notice of Injuries, 04/09/08 IAB, 6710B, NOTICE.

Background. This proposal requires that health care facilities report to the department within 24 hours any accident causing major injury, any damage or fire in the facility, and any incident of resident wandering, attempted suicide, or assault.

Commentary. The proposal was vigorously opposed by representatives of the nursing home industry, contending that the reporting requirements are overly broad and not in keeping with the requirements of neighboring states. Generally, opponents contended that reportable accidents or incidents should be limited to situations where injury or damage resulted. Department representatives said that the proposal had also received broad support, but promised to work with all stakeholders during the notice process.

Action. Further review when rules are adopted in final form. Interim review is possible in July or August.

INSPECTIONS AND APPEALS, Food and Consumer Safety, 04/09/08 IAB, 6708B, ADOPTED.

Background. These rules were initially published as a notice of intended action in December 2007. The proposal relates to inspection fees for food service establishments and revises the food inspection program. The proposed rules were controversial because they define each critical violation as a separate violation and provide that a critical violation that is uncorrected after the required date will be considered a violation for each day it remains uncorrected.

Commentary. At the January 2008 meeting, Committee members expressed a desire to see the department work cooperatively with businesses and industry groups to resolve disagreements in the proposed rules. The adopted rules have been revised; proposed language relating to penalties per day was not included and language to shorten the time period for filing an appeal from 30 days to 15 days was not included. Department representatives noted that, with these

changes, all issues have been resolved.

Action. No action taken.

Next Meeting. The next Committee meeting will be held in Senate Committee Room 116 on Wednesday, June 11, 2008, at 9:00 a.m.

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